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## **The corporation and privacy protection**

**Ought English law to be further developed to provide fuller protection for the privacy of the corporation?**

Nwozo, Jacqueline Nonye

*Awarding institution:*  
King's College London

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**The corporation and privacy protection: Ought English law  
to be further developed to provide fuller protection for the  
privacy of the corporation?**

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**This dissertation is submitted for the degree of Doctor of Philosophy in Law at  
the King's College London**

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**THE CORPORATION AND PRIVACY PROTECTION: OUGHT ENGLISH  
LAW TO BE FURTHER DEVELOPED TO PROVIDE FULLER  
PROTECTION FOR THE PRIVACY OF THE CORPORATION?**

## **ABSTRACT**

This thesis investigates whether English law ought to be further developed to provide fuller protection for the privacy of the corporation.

As an essential preliminary step, the thesis first explores the concept of privacy in general – privacy interests, definitions of privacy, rationales of privacy; and then proceeds to formulate a concept of privacy for the corporation.

The thesis advances to consider the level of protection of the privacy of the corporation in English law, and finds that only a limited level of protection is provided – in broadcasting matters – by the Broadcasting Act 1996.

The thesis then proceeds to critically examine whether the extended action for breach of confidence which protects an individual's privacy can and ought to be further developed to provide protection for the corporation's privacy, and argues that the corporation's privacy can and ought to be so developed.

The thesis also investigates whether, in the alternative, the corporation's privacy would be more suitably protected if it were developed as a property right under Article 1 of Protocol 1 ECHR, and finds that Article 1 of Protocol 1 would not suitably protect the corporation's privacy. Instead, the thesis upholds the extended action for breach of confidence as a more natural and suitable home for the protection of the privacy of the corporation in English law.

The thesis concludes with recommendations on the structural framework for the proposed protection of the corporation's privacy under the extended action for breach of confidence.

This research is undertaken primarily through doctrinal analysis; it analyses English Courts' jurisprudence, the European Court of Human Rights jurisprudence, as well as the jurisprudence of the Court of Justice of the European Union where it concerns the administration of Article 8 ECHR. Theoretical arguments are also engaged in when it comes to defining and justifying the protection of the corporation's privacy.

## **DEDICATION**

To my loving father, Dr James. C. Nwozo. Thank you for all your kindly support throughout my journey.

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## **TABLE OF CONTENTS**

Preface .....	10
---------------	----

<b>CHAPTER 1 .....</b>	<b>16</b>
------------------------	-----------

### **CONCEPT OF PRIVACY FOR THE CORPORATION**

Introduction .....	16
--------------------	----

PART 1 .....	18
--------------	----

1.1 The general concept of privacy: definition of privacy .....	18
---	----

i. Intrusion privacy interest .....	24
-------------------------------------	----

ii. Information privacy interest .....	26
--	----

iii. Researcher's definition of privacy .....	27
---	----

PART 2.....	30
-------------	----

1.2 Rationales of privacy as a valuable interest .....	30
--	----

A. Privacy and the principle of autonomy .....	30
--	----

B. Privacy and dignity .....	33
------------------------------	----

PART 3 .....	37
--------------	----

1.3 A working definition of privacy for the corporation .....	37
---	----

i. Definition of the corporation .....	38
--	----

ii. Privacy interests .....	43
-----------------------------	----

A. Intrusion privacy interest .....	43
-------------------------------------	----

B. Information privacy interest .....	46
---------------------------------------	----

iii. Definition of privacy .....	50
----------------------------------	----

iv. Rationales of privacy .....	53
---------------------------------	----

A. Dignity rationale .....	53
----------------------------	----

B. Autonomy rationale .....	53
-----------------------------	----

Conclusion .....	60
------------------	----

<b>CHAPTER 2 .....</b>	<b>62</b>
------------------------	-----------

### **THE LEVEL OF PROTECTION OF THE PRIVACY OF THE CORPORATION IN ENGLISH LAW**

Introduction .....	62
PART 1 .....	64
COMMON LAW .....	64
2.1 The traditional action for breach of confidence .....	64
A. The nature of protection the traditional action for breach of confidence provides the corporation.....	70
i. Protection against the misuse of commercial confidential information.....	71
ii. Protection for the privacy of the corporation? .....	75
2.2 Other common law actions .....	91
i. Malicious falsehood .....	91
ii. Defamation .....	94
PART 2 .....	97
STATUTE .....	97
2.3 Data Protection Act 1996 .....	97
2.4 Protection from Harassment Act 1997 .....	99
2.5 The Broadcasting Act 1996.....	102
i. Case law application of sections 110(1)(b) and 111(1) of the Broadcasting Act 1996 .....	105
Conclusion .....	111
<b>CHAPTER 3 .....</b>	<b>113</b>
<b>PROTECTING THE PRIVACY OF THE CORPORATION – THE DEVELOPMENT OF THE EXTENDED ACTION FOR BREACH OF CONFIDENCE</b>	
Introduction .....	113
PART 1 .....	116
3.1 The extended action for breach of confidence .....	116
i. The incorporation of the ECHR into the domestic law of the United Kingdom and its effect .....	116



A. The horizontal application of the HRA .....	127
B. The tort of the misuse of private information .....	135
The development of an intrusion tort .....	150
PART 2 .....	
3.2 The scope of Article 8 of the European Convention on Human Rights and the development of English law .....	160
i. Strasbourg court's interpretation of the notion and scope of Article 8 ECHR: the development of Strasbourg court's jurisprudence from the protection of individuals and to the protection of the corporations and its application to English law .....	161
I. The notion and scope of 'private life' .....	161
II. The notion and scope of 'family life' .....	171
III. The notion and scope of 'home' .....	175
IV. The notion and scope of 'correspondence' .....	185
Conclusion .....	194
<b>CHAPTER 4 .....</b>	<b>196</b>
<b>PROTECTING THE PRIVACY OF THE CORPORATION – THE DEVELOPMENT OF THE CORPORATION'S PRIVACY AS A PROPERTY RIGHT UNDER ARTICLE 1 OF PROTOCOL 1 ECHR</b>	
Introduction .....	196
PART 1 .....	198
4.1 Background: The established purpose and original scope of Article 1 of Protocol 1	
A. Established purpose of Article 1 of Protocol 1 .....	198
B. Original scope of Article 1 of Protocol 1 .....	203
PART 2 .....	204
4.2 The development of the privacy of the corporation as a property right under Article 1 of Protocol 1: The three rules .....	204
i. The entitlement to the peaceful enjoyment of possessions .....	208
ii. Deprivation of possessions .....	217
a. Formal expropriation .....	218

b. <i>De facto</i> expropriation .....	219
Conclusion .....	229
<b>CHAPTER 5 .....</b>	<b>230</b>
<b>NATURE OF THE DEVELOPMENT OF THE CORPORATION'S PRIVACY</b>	
<b>UNDER THE EXTENDED ACTION FOR BREACH OF CONFIDENCE</b>	
A. <i>Why</i> the English common law ought to be developed: Section 2 & 6 HRA 1998, and Article 13 ECHR .....	230
B. Recommendations on <i>how</i> the English common law ought to be developed .....	236
Corporation's privacy interests .....	236
Definitions of privacy for the corporation .....	238
Rationale of privacy for the corporation .....	238
The methodology .....	239
Remedies .....	240
Defences .....	244
Conclusion .....	246
<b>BIBLIOGRAPHY .....</b>	<b>247</b>
Table of International Conventions and Agreements .....	247
Table of Statutes .....	248
Table of Cases .....	251
Textbooks and Journals .....	257
Websites .....	266

## **PREFACE**

Half a decade ago, it would have almost been inconceivable for one to suggest that consideration be had for the protection of the privacy of the corporation. The scholarly writings and vibrant debates which have been had on privacy protection by scholars, judges, the press, as well as the legislature, and which led to the development of privacy protection in the English law have almost always focused on the protection of the individual; little consideration has been given to the corporation's protection. However, it has now become imperative to consider whether English law ought to be further developed to provide fuller protection for the privacy of the corporation, for the following significant reasons:

First, because of the present culture of more aggressive media reporting which has become even more intrusive into the activities of the corporation, aided by sophisticated technological advances, for instance, through the surveillance of the corporation's premises by press agents, or through the hacking into the corporation's computers or telephones, wherein the corporation has no effective means of protecting itself.

Secondly, the fact that English law presently only provides protection for the privacy of the corporation in broadcasting matters by virtue of the Broadcasting Act 1996, and protection for the corporation's privacy in the area of media [newspaper and magazine] intrusion or interference, as well as unlawful interference by public authority is presently lacking.

Thirdly, in the light of the evolution of the jurisprudence of Article 8 ECHR by the European Court of Human Rights to provide protection for the privacy of the corporation [Article 8 being the source from which the independent protection of the privacy of the individual in English law emerged, and the United Kingdom being a member of the Council of Europe which instituted the said Court].

Fourthly, in view of the development of the jurisprudence of the Court of Justice of the European Union to provide protection for the privacy of the corporation, where it concerns the administration of Article 8 ECHR [the United Kingdom being a member of the European Union].

Finally, to provide the corporation with the autonomy it requires to effectively carry out its activities.

The European Convention on Human Rights [ECHR] which is an instrument for the protection of human rights is also an instrument for the protection of fundamental rights. This means that in addition to being an instrument which provides specific protection for the *natural person*, it also provides protection for the fundamental rights of both the natural person and the *non-natural person*, which includes the corporation. To this end, in addition to the protection of the individual, the ECHR also envisaged the protection of the corporations in its provisions as illustrated in Article 34 which speaks to the jurisdiction of who can bring an action under the ECHR as including the individual as well as the corporation. Equally, under Article 1 of Protocol 1 ECHR, the corporation is also included as persons who can bring an action. The protection of the fundamental right of the corporation to its privacy under Article 8 ECHR has also been established by the European Court of Human Rights in its jurisprudence. The United Kingdom, as a Member State of the Council of Europe which instituted the ECHR, has incorporated the ECHR into its domestic law through the implementation of the Human Rights Act 1998 [HRA]; and section 2(1)(a) HRA mandates that ‘a court or tribunal in determining a question which arises in connection with a Convention right *must* take into account any judgment, decision, declaration or advisory opinion of the Court of Human Rights, where it is relevant to the proceedings in which that question has arisen’. Equally, section 6(1) HRA mandates that ‘it is unlawful for a public authority [which includes a court] to act in a way which is incompatible with a Convention right’.

In the light of this development, and in view of the jurisprudence of the European Court of Human Rights on Article 8 ECHR, the aim of this thesis is therefore to investigate whether English law ought to be further developed to provide fuller protection for the privacy of the corporation, and consequently to argue that the corporation’s privacy can and ought to be fully protected in English law in order to satisfy sections 2 and 6 HRA. ‘Fuller’, because English law already provides protection for the privacy of the corporation in matters concerning broadcasting under the Broadcasting Act 1996. This investigation also aims to satisfy Article 13 ECHR, which states that ‘everyone whose rights and freedoms as set forth in the Convention are violated *shall* have an effective remedy in national law’. Finally, this investigation

also aims to provide the corporation with the autonomy it requires to effectively carry on its activities, within the law.

Accordingly, in making the argument for the protection of privacy for the corporation, the research question – the corporation and privacy protection: ought English law to be further developed to provide fuller protection for the privacy of the corporation – is investigated by first examining the concept of privacy in general; that is to say, it examines the privacy interests, definitions of privacy, rationales of privacy; and then proceeds to examine the concept of privacy for corporations. The research subsequently advances to consider the level of protection of the privacy of the corporation in English law. The research then proceeds to critically examine whether the extended action for breach of confidence, which protects the individual's privacy, can and ought to be further developed to provide protection for the corporation's privacy; or, in the alternative, whether the corporation's privacy would be more suitably protected if it were developed as a property right under Article 1 of Protocol 1 ECHR. The research concludes with recommendations on *how* the corporation's privacy ought to be developed.

To achieve this, this research is divided into five chapters. Chapter 1 outlines the theoretical concept of what privacy is for the corporation, espousing the general concept of privacy for the individual, and advancing to declare a working definition of privacy for the corporation. In this chapter, I make a number of arguments and submissions.

a. I argue that the privacy of the individual constitutes of two interests – intrusion privacy and information privacy – and suggest that a comprehensive definition of privacy is expressed in two limbs, along the lines of these fundamental interests: first, as the state in which a person wishes to be free from unwanted intrusion; and secondly, as a claim to the control of private information from being released into the public domain, thereby protecting the said information from unwanted dissemination or publication.

b. I espouse the rationales of privacy of the individual, arguing that privacy is important for the purpose of the individual's autonomy and/or his dignity. I

consequently submit that the rationales of privacy may be pleaded independently or in conjunction with one another.

c. I proceed to test the individual's privacy interests of intrusion privacy and information privacy, as well as my definitions, and the rationales of the individual's privacy on the corporation; and submit that the privacy interests of intrusion privacy and information privacy as well as my definition of privacy also apply to the corporation. I further submit that the independent rationale of autonomy likewise applies for the corporation.

I conclude chapter 1 with the submission that the corporation has the intrusion privacy and information privacy interests which are worthy of protection in English law.

Chapter 2 through doctrinal analysis examines the level of protection of the privacy of corporations in English law. It examines the mediums of protection within which the protection of the individual's privacy under English common law was erstwhile sought [the traditional action for breach of confidence, malicious falsehood, and defamation]; it also examines the mediums of protection of certain aspects of the individual's privacy under statute [the Data Protection Act 1996, Protection from Harassment Act 1997, and the Broadcasting Act 1996]. This examination is undertaken in order to ascertain whether the privacy of the corporation is therein protected, and if so, to what extent; and finds that the privacy of the corporation is protected only to a limited extent, by the Broadcasting Act 1996. The chapter concludes with an outline of the aspects of the protection of the privacy of corporation to which the research question is directed: first, *the privacy of the corporation vs. the news press* – such as, where agents of newspapers or magazines surreptitiously intrude into the premises of the corporation, and subsequently publish the outcome of such intrusion; secondly, *the privacy of the corporation vs. public authorities* – such as, where public authorities intrude into the premises of the corporation as well as where public authorities interfere with the private information of the corporation; and finally, *the privacy of the corporation vs. other corporations* – such as, where agents of a corporation surreptitiously intrude into the premises of another corporation as well as where the said agents interfere with the private information of that corporation. The aim of this chapter is to identify the level of protection of the privacy of the corporation in English law.

Chapter 3 through doctrinal analysis addresses the manner in which the general protection of the privacy of the individual was developed, that is to say under common law, through the extended action for breach of confidence which incorporates Article 8 and 10 ECHR into the jurisprudence of English domestic law. Accordingly, the chapter investigates whether the extended action for breach of confidence ought to be further developed to provide protection for the privacy of the corporation. It establishes that by the jurisprudence of the European Court of Human Rights as well as the Court of Justice of the European Union, Article 8 ECHR provides protection for the privacy of the corporation; consequently, it submits that the corporation's privacy can and ought to be developed under the extended action for breach of confidence. The aim of this chapter is therefore to establish that corporation's privacy *can and ought to be* developed under the extended action for breach of confidence.

Chapter 4 through doctrinal analysis investigates whether, in the alternative, the corporation's privacy would be more suitably protected if it were developed as a property right under Article 1 of Protocol 1 ECHR, and finds that Article 1 of Protocol 1 would not. The aim of this chapter is to establish and uphold the extended action for breach of confidence as a more natural and suitable home for the protection of the privacy of the corporation in English law. This is because the extended action is the medium that has been established for the general protection of the privacy of the individual; equally, in view of the fact that the European Court of Human Rights is the final arbiter of human rights matters for Member States of the Council of Europe, the extended action is a more natural home for the protection of the privacy of the corporation in English law because Articles 8 & 10 ECHR, which the English common law incorporated into the cause of action for breach of confidence to establish the extended action for breach of confidence, have been the basis for the protection of privacy of the corporation at the European Court of Human Rights.

Having found that the extended action is more suitable for the development for the privacy of the corporation, chapter 5 concludes the research with recommendations on the structural framework for a proposed protection of the privacy of the corporation under the extended action for breach of confidence; this development aims to ensure compatibility with the ECHR in accordance with sections 2 and 6 HRA, as well as to ensure compliance with Article 13 ECHR.

This research is undertaken primarily through doctrinal analysis; it analyses English courts' jurisprudence, the European Court of Human Rights jurisprudence, as well as the jurisprudence of the Court of Justice of the European Union where it concerns the administration of Article 8 ECHR. Theoretical arguments are also engaged in when it comes to defining and justifying the protection of the corporation's privacy.



## CHAPTER 1

### CONCEPT OF PRIVACY FOR THE CORPORATION

Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society.

Warren and Brandeis<sup>1</sup>

### INTRODUCTION

In thoroughly investigating the question of whether English law ought to be further developed to provide fuller protection for the privacy of the corporation, an understanding of the concept of privacy, the concept of the corporation, as well as the present level of the protection of privacy in English law are imperative. The aim of this chapter therefore is to investigate the concept of privacy for the corporation by first presenting a general concept of privacy: defining the concept of privacy, examining why privacy is important; and then examining the concept of the corporation, as well as developing an understanding of the concept of privacy for the corporation.

To achieve this, the chapter is divided into three parts. Part 1 generally introduces the subject, privacy, upon which the research question is based, as well as defines the concept. It establishes that privacy protects two fundamental interests – the intrusion privacy interest and the information privacy interest – and defines privacy based on these two interests. It is suggested that the subject would not be complete without aiming to espouse why privacy is important, consequently, Part 2 explores the rationales of privacy and submits that the rationales of privacy which may be pleaded separately, or in conjunction with one another are the rationales of autonomy and dignity. Part 3 begins with an understanding of the notion of the corporation, in order to fully appreciate the research question; and proceeds to proffer a working definition of the concept of privacy for corporations. This is important because the research question seeks to investigate whether English law ought to be further developed to

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<sup>1</sup> Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220, 193.

provide fuller protection for the privacy of the corporation; thus it is imperative to set out at the beginning of the work a specific understanding of what privacy means for the corporation.

## PART 1

### THE GENERAL CONCEPT OF PRIVACY: DEFINITION OF PRIVACY

The concept of privacy has proven particularly difficult to define. In different parts of the Western world, scholars have articulated this difficulty in defining precisely what privacy is; often, those who seek to define privacy seek to describe what privacy constitutes.<sup>2</sup> The Younger Committee in its report<sup>3</sup> expressed this difficulty and added that the word 'privacy' could not be satisfactorily defined.<sup>4</sup> In spite of the vast literature on the subject, a satisfactory definition of privacy remains elusive. Privacy has been defined as a 'right',<sup>5</sup> a 'condition',<sup>6</sup> a 'state',<sup>7</sup> an 'interest',<sup>8</sup> a 'claim',<sup>9</sup> a 'value',<sup>10</sup> a 'form of control',<sup>11</sup> an 'area of life'.<sup>12</sup> It has also been proclaimed to be 'an absolutely essential value that makes life more wholesome and worth living',<sup>13</sup> 'a precondition to personhood',<sup>14</sup> 'a universal concept',<sup>15</sup> 'an aspect of one's humanity',<sup>16</sup>

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<sup>2</sup> Parker, R. B. A Definition of Privacy. *Rutgers Law Review*. 1974: 27, 275-296, 277; Prosser, W.L. Privacy. *California Law Review*. 1960: 48, 383-423, 389; Beverly-Smith, H., Ohly, A. and Lucas-Schloetter, A. *Privacy, Property and Personality*. Cambridge: Cambridge University Press, 2005, 53-54. Also see generally Cooke, J. *Law of Tort*. 7<sup>th</sup> edn. Essex: Longman, 2005; Solove, D., Rotenberg, M. and Schwartz, P. *Privacy Information and Technology*. New York: Aspen, 2006.

<sup>3</sup> Younger Committee Report: *Report of the Committee on Privacy*, Cmnd. 5012, HMSO, 1972, paras 57-61.

<sup>4</sup> This was reiterated eighteen years later in the Calcutt Committee Report: *Report of the Committee on Privacy and Related Matters*, Cmnd. 1102, HMSO, 1990, paras 3.1-3.8.

<sup>5</sup> Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220, 205.

<sup>6</sup> Weinstein, M.A The Uses of Privacy in the Good Life in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971, 88; Lusky, L. Invasion of Privacy: A Clarification of Concepts. *Columbia Law Review*. 1972:72(4), 693-710, 709; Parent, W.A. Privacy, Morality, and the Law. *Philosophy and Public Affairs*. 1983:12, 269-288, 269.

<sup>7</sup> *Hosking v Runting* [2005] 1 NZLR 1. Anderson J. defined privacy as a "state of personal exclusion from involvement with or the attention of others." At para 264.

<sup>8</sup> Prosser, W. Privacy. *California Law Review*. 1960: 48(3), 383-423, 389.

<sup>9</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967, 7.

<sup>10</sup> Whitman, J.Q. The Two Western Cultures of Privacy: Dignity Versus Liberty. *Yale Law Journal*. 2004: 113, 1151-1221, 1153.

<sup>11</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493, 483, 493; Gross, H. Privacy and Autonomy in Pennock, J. and Chapman, J. *ibid*, 169; See also Miller, A. *Assault on Privacy*. Michigan: University of Michigan Press, 1971, 25.

<sup>12</sup> *Privacy and the Law*, 1970. A Report by the British Section of the International Comm'n of Justice cited in Wacks, R. *Personal Information: Privacy and the Law*. Oxford: Clarendon Press, 1989, 14.

<sup>13</sup> Whitman, J.Q. The Two Western Cultures of Privacy: Dignity versus Liberty. *Yale Law Journal*. 2004: 113, 1151-1221, 1153.

<sup>14</sup> Reiman, J. Privacy, Intimacy and Personhood. *Philosophy and Public Affairs*. 1976: 6, 26-44, 39.

<sup>15</sup> Westin, *ibid*, 7-30.

<sup>16</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493, 486.

and a ‘fundamental freedom’.<sup>17</sup> Privacy has equally been defined in terms of freedom, with ‘gains and losses of privacy as gains and losses of freedom’.<sup>18</sup>

However, in attempting to understand the concept of privacy, a number of scholars have proffered definitions. One of the simplest and arguably earliest definition of privacy emerged from Judge Cooley who defined privacy as the right ‘to be let alone’.<sup>19</sup> This definition, though proffered by Cooley, was made better known by Warren and Brandeis<sup>20</sup> who declared that privacy is the protection of the individual and securing to that individual what Judge Cooley referred to as the right ‘to be let alone’;<sup>21</sup> therefore, the protection of privacy is merely an instance of the enforcement of the more general right of the individual to be let alone.

This definition has been criticised on the grounds that it denies privacy its distinctiveness, and a great many instances of ‘not letting people alone’ cannot readily be described as an invasion of privacy;<sup>22</sup> and hence should be rejected.<sup>23</sup> However, this criticism did not take into account the context in which that statement was made by Warren and Brandeis,<sup>24</sup> which was particularly in the light of ‘intrusion into the sacred precincts of an individual’s private and domestic life by the press’.<sup>25</sup> Although conceding that this definition of privacy is quite limited in scope, it is suggested that the definition serves as the starting point in the development of the theoretical jurisprudence of privacy.

In a further attempt at defining privacy, Gavison<sup>26</sup> states that two types of questions about privacy are important. First, with regard to the status of privacy: ‘Is privacy a situation, a right, a claim, a value, a form of control?’ Secondly, with regard to the characteristics of privacy: ‘Is privacy related to information, to physical access, to autonomy, to personal identity?’<sup>27</sup> Consequently, in adopting a value-laden concept of

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<sup>17</sup> Macklem, T. *Independence of Mind*. Oxford: Oxford University Press, 2008, 58.

<sup>18</sup> Parker, R. A Definition of Privacy. *Rutgers Law Review*. 1974: 27, 275- 296, 277.

<sup>19</sup> Cooley, T. *Cooley on Torts*. 2<sup>nd</sup> edn.1888, 29 cited in Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220, 195.

<sup>20</sup> Warren and Brandeis, *ibid*.

<sup>21</sup> At 205.

<sup>22</sup> Such as the requirement that people pay their taxes, or be enrolled in the army.

<sup>23</sup> Gavison, R. Privacy and the Limits of Law. *The Yale Law Journal*. 1980:89(3), 421-471, 437-438.

<sup>24</sup> Warren and Brandeis, *ibid*.

<sup>25</sup> At 195.

<sup>26</sup> *Ibid*.

<sup>27</sup> At 424.

privacy, Gavison defined privacy as a concept which is related to three elements – ‘secrecy, anonymity, and solitude’.<sup>28</sup> Gavison added that these three elements which are distinct and independent, yet inter-related, capture more of the suggestive meaning of privacy; thereby, providing a richer definition of the complex concept of privacy than any definition centred around only one element.

The elements of secrecy, anonymity and solitude were reiterated in the Lord Chancellor, Lord Mackay’s definition, in which he defined privacy to be a combination of these three elements, adding that privacy encompasses a right to be free from harassment and the right to privacy of personal information, communications and documents.<sup>29</sup>

Other scholars have defined privacy in terms of control.<sup>30</sup> On this definition, Fried explains that privacy is simply not an absence of information about oneself in the mind of others; rather, it entails ‘the control one has over information of oneself – the control one has over knowledge about oneself’.<sup>31</sup> This understanding of privacy is however channelled primarily to relationships of friendship, trust, and love; wherein the individual exercises control over his information in choosing to confide in intimate friends and lovers, granting them exclusive access to guarded information.

The definition of privacy as control over one’s information or knowledge is disputed by Parent<sup>32</sup> who gave an example of an individual who voluntarily divulges all sorts of intimate information about himself to his friend; he argued that although exercising control in the sense of the term, such an individual is not preserving his privacy but rather is voluntarily relinquishing much of his privacy. Parent proceeds to define privacy as the condition of not having undocumented personal knowledge about an individual, possessed by others. He stated that an individual’s privacy is diminished to the degree that others have personal knowledge about him. Parent goes on to define personal information as facts which an individual may feel sensitive about and as such chooses not to reveal about himself.

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<sup>28</sup> At 425, 428. See also Beverly-Smith, H., Ohly, A. and Lucas-Schloetter, A. *Privacy, Property and Personality*. Cambridge: Cambridge University Press, 2005.

<sup>29</sup> Lord Mackay, the Lord Chancellor {as he then was}, in his consultation paper: *Infringement of Privacy*. July, 1993.

<sup>30</sup> See Fried, C. *Privacy*. *Yale Law Journal*. 1968: 77(3), 475-493; Miller, A. *Assault on Privacy*. Michigan: University of Michigan Press, 1971.

<sup>31</sup> At 482, 483.

<sup>32</sup> Parent, W.A. *Privacy, Morality, and the Law*. *Philosophy and Public Affairs*. 1983:12, 269-288.

It is suggested however that one can preserve one's privacy whilst revealing some information within close associations and intimate friendships, thereby, sharing personal information with intimates which is not shared with others. It is also suggested that this is the context which Fried<sup>33</sup> propounded. It is further suggested that in Parent's definition of personal information, the choice which an individual has to decide whether to, or who to reveal his personal information, is the exercise of that individual's *control* over the management of his information.<sup>34</sup> It is observed that Parent's present definition of privacy varies from his earlier definition<sup>35</sup> in which he took the view that privacy may be defined as facts which though not generally considered personal, a particular person would chose not to reveal about himself. Likewise, in this earlier definition, it is suggested that the choice the individual has in deciding not to reveal certain sensitive personal information is the individual exercising of his control over such information.

The difficulty in defining privacy was further illustrated by Prosser<sup>36</sup> who stated that he would not attempt to extract a definition out of privacy. Nevertheless, in defining privacy as a tort, he declared that privacy was not an independent tort, but rather a complex of four torts. He stated that these four torts involve four distinct kinds of invasion of four different interests of the individual which are tied together by the common name '*Privacy*', but which otherwise have almost nothing in common except that each distinct cause of action represents an interference with the right of the individual 'to be let alone'; namely:

- (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- (2) public disclosure of embarrassing private facts about the plaintiff;
- (3) publicity which places the plaintiff in a false light in the public eye;

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<sup>33</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493.

<sup>34</sup> For other definitions centred on control, see Miller, A. *Assault on Privacy*. Michigan: University of Michigan Press, 1971; Beardsley, E. L. Privacy: Autonomy and Selective Disclosure in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971; Gross, H. Privacy and Autonomy in Pennock and Chapman, *ibid*; Van Den Haag, E. On Privacy in Pennock and Chapman, *ibid*; Parker, R. A Definition of Privacy. *Rutgers Law Review*. 1974: 27, 275-297.

<sup>35</sup> Parent, W.A. A New Definition of Privacy for the Law. *Law and Philosophy*. 1975: 2(3), 305-338.

<sup>36</sup> Prosser, W.L. Privacy. *California Law Review*. 1960: 48(3), 383-423.

- (4) appropriation for the defendant's advantage, of the plaintiff's name or likeness.<sup>37</sup>

Prosser's privacy division was subsequently adopted in section 625A of the Restatement, Second, of Torts 1977 of the United States of America.

In reiterating captions (2), (3), and (4) above, Parker<sup>38</sup> further stated that privacy may be defined as the ability of the individual to lead his life without anyone interfering with his family and home life, misusing his private communications, disclosing information given or received by him in circumstances of professional confidence, and interfering with his correspondence.

Cornish, Llewelyn and Aplin<sup>39</sup> in defining privacy as the desire of the individual to be free from intrusion added that an invasion of privacy included regular surveillance, surreptitious spying, interference with one's property, entry onto private premises, or acquisition and revelation of information.

Furthermore, Westin<sup>40</sup> in defining privacy in terms of being a claim, declared that privacy is the claim of individuals, institutions or groups to determine for themselves when, how, and to what extent information about them is communicated to others. He added that viewed in terms of the relation of the individual with social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means either in a state of solitude, or in small group intimacy, or in a conditions of anonymity, or reserve.<sup>41</sup>

The difficulty in defining privacy was also expressed by the Calcutt Committee in its report,<sup>42</sup> in which it stated that it had not found a wholly satisfactory statutory definition of privacy; but nevertheless stated that the definition of privacy, however imprecise, was needed as a yardstick with which to measure complaints and solutions.

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<sup>37</sup> At 389.

<sup>38</sup> Parker, R. B. A Definition of Privacy. *Rutgers Law Review*. 1974: 27, 275-296, 277.

<sup>39</sup> Cornish, W., Llewelyn, D. and Aplin, T. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. 8<sup>th</sup> edn. London: Sweet & Maxwell, 2013, 357.

<sup>40</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967, 7.

<sup>41</sup> Privacy has also been defined as a right to be free from harassment. See Government Response to the National Heritage Select Committee, *Privacy and Media Intrusion*, Cmnd. 2918, HMSO, 1995.

<sup>42</sup> Calcutt Committee Report: *Report of the Committee on Privacy and Related Matters*, Cm. 1102, HMSO, 1990. The Calcutt Committee was a committee instituted precisely to look into press behaviour with regard to personal privacy.

To this end, the committee indicated that privacy could be regarded as the antithesis of that which is public, and includes everything concerning an individual's home, health, family, religion, sexuality, personal legal and personal financial affairs. It further stated that privacy is the right of an individual to be protected against intrusion into his or her personal life or affairs, or those of his or her family, by direct physical means or by publication of information. It added that privacy includes protection from publication which is hurtful or embarrassing, inaccurate, or misleading; as well as protection from the publication of photographs or recordings of an individual taken without his consent.<sup>43</sup>

From the above definitions, it is observed that there is yet an unresolved academic consensus of what privacy really means, as well as its scope.<sup>44</sup> Nevertheless, it may be clearly stated that from the above definitions, two common themes emerge. They are the two fundamental privacy interests: the intrusion privacy interest – which involves an unwanted interference into an individual's physical space, home or property; and the information privacy interest – which involves limiting publication or dissemination of certain information considered private. These two fundamental privacy interests represent the core of the provisions of the Article 8 European Convention on Human Rights right which protects the right to one's 'private life, family life, home and correspondence'.

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<sup>43</sup> The notion of privacy as 'the antithesis of that which is public' has been reversed by the holding in the case of *Von Hannover v Germany* [2005] 40 EHRR 1, in which privacy violation was held to be possible even if the said violation occurred in a public place.

<sup>44</sup> For more on the general concept of privacy, see Roberts, J. and Gregor, T. Privacy: A Cultural View in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971; Silber, J. Masks and Fig Leaves in Pennock and Chapman, *ibid*; Simmel, A. Privacy is not an Isolated Freedom in Pennock and Chapman, *ibid*; Friedrich, C. Secrecy versus Privacy: The Democratic Dilemma in Pennock and Chapman, *ibid*; Spiro, H. Privacy in Comparative Perspective in Pennock and Chapman, *ibid*; Weinstein, W.L. The Private and the Free: A Conceptual Inquiry in Pennock and Chapman, *ibid*; Mead, M. *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilization*. London: Cape, 1929; Anderson, D.A. The Failure of American Privacy Law in Markesinis, B. (ed) *Protecting Privacy*. Oxford: Oxford University Press, 1999; Hall, E. *The Hidden Dimension*. New York: Anchor Books, 1966; Ardrey, R. *The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nation*. London: Collins, 1967; Hsu, F. *Americans and Chinese: Two Ways of Life*. New York: Schuman, 1953; Murdock, G.P. Outline of World Cultures. New Haven: Human Relations Area Files, 1963; Murdock, G.P. The Universals of Culture in Hoebel, E.A, Jennings, J.D. and Smith, E.R.(eds) *Readings in Social Anthropology*. New York: McGraw- Hill, 1955; Feldman, D. Privacy – Related Rights and Their Social Value in Birks, P. (ed) *Privacy And Loyalty*. Oxford: Clarendon Press, 1997; Lewin, K. *Resolving Social Conflicts*. New York: Harper and Row, 1948; Murphy, R. Social Distance and the Veil. *American Anthropologist*. 1964: 66, 1257-1274; Zimmerman, D. Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort. *Cornell Law Review*. 1983: 68, 291-365. Darling, F. Social Behaviour and Survival. *Auk*. 1952: 69 @ <http://www.jstor.org/stable/4081268> Accessed on the 14/11/2011.



A consideration of these fundamental privacy interests is outlined below.

*Intrusion privacy interest*

This is the desire to want to be free from unwanted access or disturbance or interference or surveillance into one's private sphere – a sphere in which an individual is free to carry on his activities – and this includes unwanted access into one's physical space, one's home, or one's property.

An individual may want to be in a state of solitude or seclusion, he may want to create a physical or psychological barrier to the 'outside world' – outside the circle of persons whom he may deem to be among an intimate circle of friends; the individual may also more generally want to be free from disturbance or interference or surveillance. In all these states, the aim, it is suggested, is the pursuit of freedom from unwanted access. This aim is also captured in the Oxford English Dictionary definition of intrusion as "the action of coming into a place or situation where you are unwelcome or uninvited".<sup>45</sup>

The breach of this aspect of privacy is seen in the unwanted and unjustified access or disturbance or interference or surveillance into one's physical sphere, or one's home, or one's property. This may be illustrated by the prying on an individual whilst he is undertaking activity which he may not wish to share with others, such as, for example, prying on the individual while he is taking a bath.<sup>46</sup> In this case, a peeping Tom's surreptitious viewing of the individual in this state may constitute a breach of the individual's privacy. This unwanted intrusion on the individual may occur where the peeping Tom is physically present within the premises; it may also occur where the peeping Tom engages in the surreptitious activity by means of modern technology, such as viewing the individual through the use of zoom lens with the intent of saving the information obtained for personal use. In this case of intrusion, the focus of the breach of privacy is on the act of prying, and not on the dissemination or publication of the result of the surreptitious activity. Thus, the unwanted and unjustified surreptitious

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<sup>45</sup> Soanes, C., Hawker, S., and Elliott, J. (eds). *Oxford English Dictionary*. 6<sup>th</sup> ed. Oxford: Oxford University Press, 2005, 398.

<sup>46</sup> See, for instance, *C v Holland* [2012] NZHC 2155.

viewing of the individual, without more, would constitute a breach of the intrusion aspect of privacy.<sup>47</sup>

The breach of the intrusion aspect of privacy may also be illustrated in the unwanted and unjustified persistent pursuit of an individual in the hope of obtaining newsworthy information.<sup>48</sup> As with the case of the peeping Tom above, in this case, the focus of intrusion is on the action of the pursuit, and not on whether newsworthy information was successfully gathered and possibly disseminated or published; thus, whether the pursuit is successful or not, the mere action of pursuing the individual constitutes an intrusion.

Equally, the breach of the intrusion aspect of privacy may be illustrated in the unwanted and unjustified search of an individual,<sup>49</sup> his home, or his property; it may also occur in the event of a consequent seizure resulting from a search. As with the peeping Tom and the pursuit cases above, the focus of this case of intrusion is not on the result of the search, but on the search itself.

Furthermore, the breach of the intrusion aspect of privacy may also occur in the unwanted and unjustified hacking into an individual's telephone or computer.<sup>50</sup> The hacking may be instituted for the purpose of the surveillance of an individual by the authorities with the intent of using the obtained information in other investigation, and without dissemination or publication. In this instance, the focus of the breach in this case of intrusion is on the action of hacking into the individual's telephone or computer. Thus, the hacking would be properly treated under the intrusion privacy interest. If, however, the hacking in question is instituted for instance by the media, with the primary intent of consequent publication or dissemination, it ceases to be a violation which would be treated as an intrusion privacy action at the point where the contents of information obtained from the hacking are disseminated or published. Thus, upon the publication or dissemination of information, the case would properly be dealt as an information privacy matter.

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<sup>47</sup> In this case, the individual whose privacy has been infringed may not even be aware that this has occurred; it nevertheless does not cease to be an intrusion merely because the individual is unaware of its occurrence.

<sup>48</sup> See, for instance, *Wood v Commissioner for Police of the Metropolis* [2009] 4 All ER 951, [see Lord Laws at para 34].

<sup>49</sup> See, for instance, *Wainwright v Home Office* [2002] 3 WLR 405.

<sup>50</sup> See, for instance, *Sienna Miller v Newsgroup Newspapers Ltd* [Claim No. HC10C03458, 2011].

It may also be argued that an individual being captured by over 300 CCTV cameras in the course of a busy day in central London is a highly intrusive undertaking reminiscent of ‘big brother watching you’.<sup>51</sup> This action, although intrusive, may however not violate the intrusion privacy interest because although it may be unwanted, it is arguably justified as a result of the national security issues of the day.

The intrusion privacy interest therefore involves unwanted interference or disturbance, without more – that is to say, in the absence of publication or dissemination. The focus of the intrusion privacy interest is therefore on the interference or disturbance itself – the intrusion – and not on the dissemination or publication of the result of the intrusion.

### Information privacy interest

This privacy interest involves the protection of an individual’s private information from unwanted dissemination or publication. Private information are facts about an individual which that individual may not want to reveal about himself. It may include a variety of information which individuals may want to keep to themselves such as their sexual life, physical or mental health condition, religious beliefs, political opinions, ethnic origin, financial information, and criminal record;<sup>52</sup> it may also include information which may be found in the individual’s home or property, such as information in personal files or documents relating to the running of the individual’s home, the individual’s private life, or the life of the individual’s partner or the individual’s children.

The breach of this aspect of privacy occurs in the unwanted and unjustified publication or dissemination of an individual’s private information. Thus, as indicated in the intrusion privacy section above, where a peeping Tom engages in surreptitious activity with the use of zoom lens technology, with the intent of saving the result of such prying for personal use, such a case would properly be dealt with under intrusion privacy. However, where he proceeds to disseminate or publish the private information resulting from the surreptitious activity, at that point of dissemination or publication,

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<sup>51</sup> See Orwell, G. 1984. London: Penguin Books, 1949.

<sup>52</sup> These are referred to as ‘sensitive personal data’ by Section 2 of the Data Protection Act 1998 which is an Act that provides for the regulation of the processing of information relating to individuals.

the case became one which would properly be dealt with as an information privacy matter.

The same principle applies to the case of the persistent pursuit of an individual in the hope of obtaining newsworthy information, the search and/or seizure of an individual's property, or the hacking of an individual's telephone or computer; as such, where the private information derived therefrom is disseminated or published, it becomes a case to be dealt with as an information privacy matter.

Information privacy therefore involves the unwanted dissemination or publication of private information. It differs from the intrusion privacy interest in that the focus of the intrusion privacy is on an interference or disturbance, without more – the intrusion; while the focus of the information privacy interest is on the dissemination or publication of private information. The information privacy interest has been the driving force of the development of privacy in English law.<sup>53</sup>

From the above, it is therefore submitted that the two fundamental privacy interests – intrusion privacy and information privacy – independent of each other may result in a loss of privacy; thus a privacy action may be brought where an intrusion has occurred independent of the misuse of private information. Indeed, these two fundamental privacy interests are the hallmark of what privacy represents, and are reflected in comprehensive definitions of privacy.<sup>54</sup>

#### Researcher's definition of privacy

In attempting to define the individual's privacy, therefore, it is proposed that privacy, though a broad concept, may be defined in two limbs along the lines of these fundamental interests. First, privacy may generally be defined as the state in which one desires to be free from unwanted interference or disturbance – intrusion – into his private sphere, which includes his physical space, or his home or his property; and secondly, privacy may be defined generally as a claim to the control of an individual's private information from being released into the public domain against the individual's

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<sup>53</sup> This is fully discussed in chapter 3.

<sup>54</sup> These two privacy interests are further discussed in the working definition of privacy for corporations in part 3 below. For further elaboration on these core privacy interests, see generally Warby, M., Moreham, N. and Christie, I. (eds) *Tugendhat and Christie The Law of Privacy and the Media*. 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2011, chapters 2 and 10.

wishes, thus protecting the said information from unwanted dissemination or publication.

On this definition, it is noted that intrusion into the individual's private sphere may occur through the disruption of the individual's desire to retreat into the halls of his own sanctuary or seclusion, a space in which he enjoys a variety of states such as solitude, anonymity, reserve, the development of intimate relationships, and also the development of his personality – in a state in which he may desire to be free from unwanted intrusion or exposure. Equally, intrusion into the individual's home or property may occur through surveillance, surreptitious spying, or by means of entry into the individual's home or property by public authorities, and the search and seizure of documents.

A breach of an individual's privacy therefore occurs where an individual's physical space, home or property has been intruded upon or interfered with by another, against the wishes of the individual, and without justification by the law. Equally, the breach of the individual's privacy also occurs where the individual's private information has been misused, that is to say, where there has been an unwanted and unjustified dissemination or publication of the individual's private information.

This two limbed definition is of importance as it encompasses the fundamental privacy interests of intrusion privacy and information privacy – that is to say, limiting unwanted access to the individual, his home or his property, as well as limiting unwanted communication of the individual's private information – thereby enabling the individual to exercise autonomy within the society.<sup>55</sup> Indeed, this protection from intrusion, as well as the protection of private information from unwanted dissemination or publication are the hallmark of the protection of privacy; and it is suggested, reflect a comprehensive definition of privacy.<sup>56</sup>

It is noted that although in a majority of situations the protection of privacy is a purely individual matter concerning natural persons, there are also situations where the

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<sup>55</sup> Autonomy is discussed in the *rationales of privacy* under *privacy and the principle of autonomy*, in section 2 below.

<sup>56</sup> This two limbed nature of the definition of privacy was recognised and captured by Cambridge dictionary in its definition in which it stated that privacy is (a) "someone's right to keep their personal matters and relationships secret"; and (b) "the state of being alone". See Cambridge Dictionary@ <http://dictionary.cambridge.org/dictionary/british/privacy?q=privacy> Accessed on 17/11/2011.

protection of privacy is a matter which may affect corporate persons such as corporations. This is examined in the working definition of privacy for corporations in the last part of this chapter, however, before that, investigations are made into the rationales of privacy and the concept of the corporation.

## PART 2

### RATIONALES OF PRIVACY AS A VALUABLE INTEREST

This section examines the necessity as well as the value that privacy has in the life of the individual. It investigates the importance of privacy and argues that the preservation of the individual's autonomy and/or dignity are the core rationales of privacy. It also argues that these rationales may be pleaded independently or in conjunction with one another in an argument for why privacy is important.

#### *Privacy and the principle of autonomy*

In my definition of privacy above, I defined privacy first, as one's desires to be free from unwanted interference or disturbance – intrusion – into his physical sphere, his home or his property; and secondly, as the claim of an individual to the control of his private information, and the protection of said information from unwanted dissemination or publication. It is argued that the ability of an individual to decide whether, or when to, or when not to disclose information about himself – the right to control the dissemination or publication of private information about himself – is brought about by the exercise of autonomy: the individual's personal autonomy. This power to control the dissemination or publication of his private information is what Beardsley<sup>57</sup> views as 'selective disclosure', Fried<sup>58</sup> refers to this as 'control over information or knowledge', and Fenwick and Phillipson<sup>59</sup> explains it as 'informational autonomy or informational control'.<sup>60</sup>

Equally, privacy provides conditions in which individuals are liberated from the intrusive influences of others.<sup>61</sup> The ability of an individual to decide whether, when to, or when not to allow access into his physical space, his home or his property – the right to protect against unwanted intrusion – is also a function of the autonomy of that individual – his personal autonomy. Autonomy as a rationale of privacy therefore provides the individual the power to decide who to allow access into his domain,

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<sup>57</sup> Beardsley, E. L. Privacy: Autonomy and Selective Disclosure in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971, chapter 3.

<sup>58</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493, 482-3.

<sup>59</sup> Fenwick, H. and Phillipson, G. *Media Freedom under the Human Rights Act*. Oxford: Oxford University Press, 2006, 662-665.

<sup>60</sup> See generally Rachel, J. Why Privacy is Important. *Philosophy and Public Affairs*. 1975: 4, 323-333.

<sup>61</sup> See generally Freund, P. One Concept or Many in Pennock and Chapman, *ibid*.

thereby giving him the autonomy to realise his full potential. As Negley<sup>62</sup> comments, some degree of privacy is necessary in order to ensure to the individual the possibility of choice and action. Thus, by limiting ‘the disclosure of private information about an individual’ and ‘who has access to an individual’, privacy affords individuals control over who to share the most private sphere of their lives with. It is therefore this autonomy to control ‘who has access to us’, or ‘who disseminates what about us’, which forms an essential argument for the value of privacy.<sup>63</sup>

Privacy is also important for protecting an individual’s independent thoughts, opinions, and other private information from social pressures brought about by the intrusion into the individual’s life through scrutiny, censure, ridicule, and pressure to conform. An individual in modern society needs space and time for reflection, meditation and planning, as well as time apart to rationalise his thoughts and opinions.<sup>64</sup> Privacy provides this opportunity for the individual while he struggles to incubate and integrate these ideas, and also provides the proper timing of the decision to transcend from the private realm to the public domain – to test these ideas before his peers, or before other individuals.<sup>65</sup> The ability of the individual to utilize the space and time privacy provides him for reflection, meditation, planning, and the rationalisation of thoughts and opinions, proceed from that individual’s exercise of his autonomy. The autonomy which privacy provides in the circumstance aids in the process of the development of the individual’s personality, individuality, and conscious individual choices which the individual makes in his life.<sup>66</sup>

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<sup>62</sup> Negley, G. Philosophical Views on the Value of Privacy. *Law and Contemporary Problems*. 1966: 31, 319-325, 320.

<sup>63</sup> See generally Rachel, J. Why Privacy is Important. *Philosophy and Public Affairs*. 1975: 4, 323-333; Reiman, J. Privacy, Intimacy and Personhood. *Philosophy and Public Affairs*. 1976: 6, 26-44; Gavison, R. Privacy and the Law. *The Yale Law Journal*. 1980: 89(3), 421-471; Macklem, T. *Independence of Mind*. Oxford: Oxford University Press, 2008.

<sup>64</sup> See generally Barendt, E. Privacy as a Constitutional Right and Value in Birks, P. (ed) *Privacy and Loyalty*. Oxford: Clarendon Press, 1997; Weinstein, M.A The Uses of Privacy in the Good Life in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971; Wong, S. The Concept, Value and Right of Privacy. *UCL Jurisprudence Review*. 1996: 3, 165-182.

<sup>65</sup> See generally Fenwick, H. and Phillipson, G. *Media Freedom under the Human Rights Act*. Oxford: Oxford University Press, 2006.

<sup>66</sup> See generally Jourard, S. Some Psychological Aspects of Privacy. *Law and Contemporary Problems*. 1966:31(2), 307-318 @ <http://www.jstor.org/stable/1190673> Accessed on 19/10/2010; See also Long, E.V. The Intruders cited in Benn, S. I. Privacy, Freedom and Respect for Persons in Pennock and Chapman, *ibid*; Simmel, A. Privacy is not an Isolated Freedom in Pennock and Chapman, *ibid*. Reiman, J. *ibid*. Reiman suggests that the right to privacy protects the interest every individual has in developing a



Likewise, privacy provides a sanctuary for the release of one's emotions resulting from stresses and tensions of life.<sup>67</sup> In these modern times, living life in the society comes with stresses which can physically and mentally affect an individual if he does not set aside a private time with which to unwind and release his emotional when necessary.<sup>68</sup> The individual in modern society plays a succession of wide-ranging roles subject to the audience and environment. In this sense, the individual is metaphorically a 'social actor' who performs before a 'world stage' with the main aim of maintaining coherence while adjusting to different settings life places before him.<sup>69</sup> In Weinstein's<sup>70</sup> view, human beings have a *social self* with which they face the outside self, and which is in consonance with social norms; and an *actual self*, constituted by personal activities and inclinations. The sanctuary of privacy therefore provides an opportunity for the *actual self* to lay aside his mask with which he faces the outside world, and release his true feelings without interference, while maintaining social relationships.<sup>71</sup> This is what Westin refers to as 'emotional release'.<sup>72</sup> This emotional release consequently links privacy with the ability of individuals to maintain mental health. Accordingly, privacy is valuable in the interest of the individual's physical, emotional, mental, and spiritual well-being.<sup>73</sup> Indeed, privacy provides a special kind of independence, which it is submitted, ensues from the individual's ability to exercise his autonomy; this in turn affords the individual the autonomy to be himself.

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sense of his own identity and personhood {becoming, being, and remaining a person}; and Macklem, T. *Independence of Mind*. Oxford: Oxford University Press, 2008.

<sup>67</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967. See also Macklem, *ibid*; Wong, S. The Concept, Value and Right of Privacy. *UCL Jurisprudence Review*. 1996: 3, 165-182.

<sup>68</sup> Westin, *ibid*.

<sup>69</sup> Goffman, E. *The Presentation of Self in Every Day Life*. New York: Anchor Books, 1959.

<sup>70</sup> Weinstein, M.A The Uses Of Privacy in The Good Life in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971. See generally Goffman, *ibid*.

<sup>71</sup> See generally, Barendt, E. Privacy as a Constitutional Right and Value in Birks, P. (ed) *Privacy And Loyalty*. Oxford: Clarendon Press, 1997. See also Wong, S. The Concept, Value and Right of Privacy. *UCL Jurisprudence Review*. 1996: 3, 165-182.

<sup>72</sup> Westin, *ibid*.

<sup>73</sup> Davis, M. Do we need our Privacy? *Entertainment Law Review*. 1997:8(8), 286-289.

Studies have shown that individuals may become victims of mental illness due to pressure to conform to societal norms and expectations. See Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967; Gavison, R. Privacy and the Limits of Law. *The Yale Law Journal*. 1980: 89(3), 421-471.

For studies on the link between privacy and mental health, see Jourard, S. Some Psychological Aspects of Privacy. *Law and Contemporary Problems*. 1966:31(2), 307-318 @ <http://www.jstor.org/stable/1190673> Accessed on 19/10/2010.

Privacy has also been rationalized on the basis of intimacy. In Inness<sup>74</sup> view, privacy is a shared experience of intimacy and is inherently valuable because it offers the individual control over the most intimate aspects of their lives – intimate, not because it involves isolation from others, but because it involves emotions such as loving, caring and liking.<sup>75</sup> Similarly, the importance of privacy has been espoused on the basis that it aids in the development of relations of the most fundamental sort: love, friendship, trust and respect, which is at the heart of individuality.<sup>76</sup> In Fried's<sup>77</sup> view, privacy is the control one has over information or knowledge about oneself in relationships of love, friendship, trust and respect; he however acknowledged that the value of privacy could be comprehended in many other forms not limited to relationships of love, friendship, trust and respect alone.<sup>78</sup>

It is suggested that the control which the individual exercises in Inness's<sup>79</sup> and Fried's<sup>80</sup> accounts of the importance of privacy ensue from the individual's exercise of his autonomy.

It is accordingly submitted that the power which the individual exercises in the control of his private information regarding 'who knows what about him' *vis-à-vis* who to or who not to share such information with, or who has access to him, or the individual's independence to protect his thoughts, opinions, and other private information from social pressures, as well as the individual's power to decide whether or how to alternate the roles which he plays in society, are all merely different expressions of the exercise of the individual's autonomy – his personal autonomy.

### ***Privacy and dignity***

In my definition of privacy above, privacy was first defined as one's desire to be free from unwanted interference or disturbance – intrusion – into his physical sphere, his

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<sup>74</sup> Inness, J.C. *Privacy, Intimacy and Isolation*. OUP 1992, chapter 6 @ <http://www.oxfordscholarship.com/oso/public/content/philosophy/9780195104608/toc.html>  
Accessed on 17/12/2010.

<sup>75</sup> Ibid.

<sup>76</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493, 477-482. See also Feldman, D. Secrecy, Dignity or Autonomy? Views of Privacy as a Civil Liberty. *Current Legal Problems*. 1994: 47(2), 42 – 71.

<sup>77</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493.

<sup>78</sup> Fried, 482-484.

<sup>79</sup> Inness, *ibid*.

<sup>80</sup> Fried, *ibid*.

home or his property; and secondly, as the claim of an individual to the control of his private information, and the protection of said information from unwanted dissemination or publication. It was suggested that the ability of an individual to decide whether, or when to, or when not to disclose information about himself – the right to control the dissemination or publication of information about his private life – is brought about by the exercise of that individual's autonomy. It is further suggested that in addition to this above position, the desire of an individual to control the dissemination or publication of information about his private life may also, or, in the alternative, be brought about by that individual's pursuit to maintain his dignity.

Likewise, it was suggested that the ability of an individual to decide through independent evaluation whether, when to, or when not to allow access into his physical sphere, his home or his property – the right to protect against unwanted intrusion – is also a function of that individual's autonomy. It is equally suggested that in addition to this above position, the desire of an individual to protect himself from unwanted intrusion may also, or, in the alternative, be brought about by that individual's pursuit to maintain his dignity. It is this pursuit of dignity which forms an essential argument for the value of privacy.

Dignity may be expressed as the state of being worthy of, and commanding respect and honour.<sup>81</sup> This pursuit of the maintenance of dignity is the subject of Kant's<sup>82</sup> account, that the respect of the basic values of an individual is the supreme limiting condition of every individual's freedom of action. Indeed, every individual is entitled to respect. Where an individual's privacy is not respected, the resultant intrusion into the core of his being amounts not only to a violation of his autonomy, but also, or in the alternative, to an affront to his dignity.<sup>83</sup> It is this entitlement to respect that a

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<sup>81</sup> Rosen, J. *The Unwanted Gaze: The Destruction of Privacy in America*. New York: Random House, 2000.

<sup>82</sup> Kant, I. *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie Because of Philanthropic Concerns*. 3<sup>rd</sup> ed. Indianapolis: Hackett Publishing Company, 1993. See also Moreham, N. Why is Privacy Important? Privacy, Dignity and the Development of the New Zealand Breach of Privacy Tort in Finn, J. and Todd, S. (eds) *Law Liberty and Legislation*. Wellington: LexisNexis, 2008.

<sup>83</sup> See generally Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220. See also Bloustein, E.J. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. *New York University Law Review*. 1964: 39, 962-1007; Benn, S. I. Privacy, Freedom and Respect for Persons in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971; Wong, S. The Concept, Value and Right of Privacy. *UCL Jurisprudence Review*. 1996: 3, 165-182.

number of scholars such as Bloustein,<sup>84</sup> Benn,<sup>85</sup> Kant,<sup>86</sup> Whitman,<sup>87</sup> and Wong,<sup>88</sup> suggest underpins dignity as an essential value of privacy. Conversely, failure to respect the individual's dignity amounts to an affront to the individual's dignity which brings on profound feelings of humiliation, shame and unworthiness.

Some scholars such as Bloustein,<sup>89</sup> Warren and Brandeis,<sup>90</sup> and Neill,<sup>91</sup> have defined the rationale of privacy on these terms, suggesting that all invasions of an individual's privacy are violations of the individual's dignity, as the exposure of an individual's private information to public scrutiny is a tendency in the direction of stripping that individual of his human dignity. Thus, in addition to, or as an alternative to the autonomy rationale, by limiting the disclosure of private information about an individual and who has access to that individual, privacy, through dignity, affords individuals control over who to share the most private sphere of their lives with.

From the above rationales of privacy, therefore, it is submitted that the autonomy and dignity rationales may be pleaded independently, or in conjunction with one another in an argument for why privacy is important. Thus, the autonomy rationale of privacy and all that is encapsulated thereunder may be pleaded alone, as illustrated by the views expressed by such scholars as Negley, Fried, Inness, above; likewise, the dignity rationale of privacy may also be pleaded alone, as demonstrated in the view expressed by Bloustein, Warren and Brandeis, and Neill, above. Equally, the autonomy and dignity rationales of privacy which are also supported by case law of the English courts as well as the European Court of Human Rights<sup>92</sup> may be pleaded in

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<sup>84</sup> Bloustein, E.J. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. *New York University Law Review*. 1964: 39, 962-1007.

<sup>85</sup> Benn, S. I. Privacy, Freedom and Respect for Persons in Pennock, J. and Chapman, J.(eds) *Privacy Nomos XIII*. New York: Atherton Press, 1971.

<sup>86</sup> Kant, I. *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie Because of Philanthropic Concerns*. 3<sup>rd</sup> ed. Indianapolis: Hackett Publishing Company, 1993.

<sup>87</sup> Whitman, J.Q. The Two Western Cultures of Privacy: Dignity versus Liberty. *Yale Law Journal*. 2004: 113, 1151-1221.

<sup>88</sup> Wong, S. The Concept, Value and Right of Privacy. *UCL Jurisprudence Review*. 1996: 3, 165-182.

<sup>89</sup> Ibid.

<sup>90</sup> Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220.

<sup>91</sup> Neill, B. A Challenge for the Next Century in Markensins, B.A. (ed) *Protecting Privacy*. Oxford: Oxford University Press, 1999.

<sup>92</sup> For the case law of the UK, see *Douglas v Hello! Ltd* [2001] QB 967, 1001&1025; *Campbell v Mirror Group Newspapers* [2004] 2 AC 457, para 51; *Mosley v News Group Newspaper* [2008] EWHC 1777

conjunction with one another, as demonstrated in cases such as *Douglas*, *Campbell*, *Moseley*, and *Goodwin*.<sup>93</sup>

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(QB), para 99, 214. For the case law of the European Court of Human Rights, see *Goodwin v United Kingdom* [2002] 35 EHRR 18, para 90.

It is worthy of mention that the rationales of privacy in the case law of other common law jurisdictions such as Australia and New Zealand also resonate with the rationales of autonomy and/or dignity. See the Australian case of *Australian Broadcasting Corporation v Lenah Game Meats Property Ltd* [2001] HCA 63, para 43{dignity}; and the New Zealand case of *Hosking v Runting* [2005] 1 NZLR 1, para 34 {autonomy}.

<sup>93</sup> Ibid.

## **PART 3**

### **A WORKING DEFINITION OF PRIVACY FOR THE CORPORATION**

Privacy has almost always been defined from the perspective of the individual. Scholars have often defined the notion of privacy through themes of personhood, individuality, humanity, and as a fundamental human right. This raises the question of whether privacy matters affect the corporation.

In a majority of English law cases, the infringement of privacy often concerns the individual and is protected under the extended action for breach of confidence which incorporates Articles 8 and 10 of the European Convention on Human Rights 1950 [ECHR] into the action for breach of confidence.<sup>94</sup> However, it is suggested that there are instances in which privacy matters affect the corporation, and for such circumstances this section develops an understanding of what privacy means for the corporation.

In developing a working definition of privacy for the corporation, therefore, this investigation engages four key concerns.

First, an examination of what a corporation is, and what rights it has, is undertaken so as to understand the concept of the corporation upon which the research question is based.

Secondly, having submitted in part 1 of this chapter that privacy protects two fundamental interests – intrusion privacy and information privacy – an examination is

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<sup>94</sup> Article 8 ECHR which protects against the invasion of privacy provides

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 ECHR which protects the freedom of expression provides

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The extended action for breach of confidence is critically examined in chapter 3.

made into these two privacy interests. In making this examination, therefore, the intrusion privacy interests and information privacy interests are tested on the corporation; this investigation will demonstrate how the privacy interests of intrusion privacy and information privacy apply to the corporation.

Thirdly, the definitions of privacy of the individual, as discussed in part 1 of this chapter, are equally tested on the corporation; this investigation establishes a definition of privacy for the corporation.

Finally, the two independent rationales for the privacy of the individual are also tested on the corporation. In making this examination, therefore, the autonomy and dignity rationales of the privacy of the individual are tested on the corporation to examine whether they may apply to the corporation. This examination will find that the sole rationale of the corporation's privacy is the autonomy rationale. It will also demonstrate that a cause of action which has more than one rationale for the individual's protection can equally have a single rationale in the case of the corporation's protection; it makes this illustration by highlighting the case of reputation under defamation which has the rationales of dignity, honour, and property for the individual's protection, but has the sole rationale of property for the corporation's protection.

As such, the abovementioned tests will generally demonstrate that privacy also applies to corporations, and corporations do have privacy aspects which are worthy of protection in English law.

### **Definition of the corporation**

An essential preliminary step in pursuing this research is defining the notion of a 'corporation'. Thus, this section provides an understanding of what a corporation is, and also investigates the extent of its rights and privileges as prescribed by the law.

A corporation is a juristic or a juridical person – an artificial entity established and recognised by law. In the United Kingdom, it is registered by one or more persons and incorporated under the Companies Act 2006 to carry on business, as well as other

activities.<sup>95</sup> It is directed, controlled and managed by its management team. A corporation also refers to companies that are established by royal charter.<sup>96</sup> In law, the concept of a corporation is such that as a result of incorporation, it becomes a legal person – a non-natural person with a distinct separate existence – a separate entity with legal personality.<sup>97</sup>

The fundamental importance of the concept of separate legal personality of the corporation was espoused in the *locus classicus* case of *Salomon v A. Salomon & Co Ltd*.<sup>98</sup> In this case, Mr Salomon, a sole trader sold his solvent business to a company, *A Salomon & Co Ltd*, which was incorporated for that purpose. The only members of this company were himself, and six members of his family; in compliance with the minimum number of a company's members at the time, which was seven.<sup>99</sup> Subsequently, the company went into liquidation, and was unable to pay the ordinary creditors. The liquidator on behalf of the unsecured creditors of the company resisted Mr Salomon's claim to enforce his floating charge, and the matter went to court.

The court of first instance held that Mr Salomon was a mere nominee and agent of the company, hence refused to recognise its separate existence from the members.

The Court of Appeal opined that the formation of the company was a mere scheme to enable Salomon to carry on business in the name of the company with limited liability, and therefore held Mr Salomon to be a trustee of the company. Hence, the appeal was dismissed.<sup>100</sup>

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<sup>95</sup> Such as charity activities with regard to corporations that are charities. The Companies Act 2006 is herein after referred to as CA 2006.

<sup>96</sup> An example is the BBC.

There are different types of corporations such as the private company limited by shares {see Section 3(2) CA 2006 and Section 4(1) CA 2006}; Private company limited by guarantee - see Section 3(3) CA 2006; Unlimited company - see Section 3 CA 2006; Public limited company - see Section 4(2) CA 2006.

<sup>97</sup> For the corporate form, see generally, Companies House @ <http://www.companieshouse.gov.uk/toolsToHelp/WCInfo.shtml> Accessed on 30/11/2011; Companies House Limited Liability Partnerships @ <http://www.companieshouse.gov.uk/infoAndGuide/llp.shtml> Accessed on the 1/11/2011; Co-operatives UK @ <http://www.uk.coop/about/what-is-a-cooperative> Accessed on 1/11/2011; Directives of Co-operatives in the UK @ <http://www.uk.coop/directory/all> Accessed on 30/11/2011; International Co-operative Alliance @ <http://www.ica.coop/ica/index.html> Accessed on 1/11/2011. Whittaker, J., Machell, J. and Ives, C. *The Law of Limited Liability Partnerships*. Bristol: Jordan Publishing Limited, 2004.

<sup>98</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22.

<sup>99</sup> Currently, the minimum number is one, according to the Section 7 CA 2006.

<sup>100</sup> It is noted that recognition of the separate legal personality of big well-established businesses was accepted by the judiciary without much opposition. See *The Princess of Reuss* [1871] 5 LR 176 [HL].



However, the House of Lords rejected the reasoning of the lower courts, holding, *inter alia*, that the company was duly formed and registered and that all the requirements of the Companies Act 1862 had been duly observed. Therefore the company was not a mere ‘alias’ or agent of, or trustee for the vendor, and hence he was not liable to indemnify the company against its creditors’ claim.

Lord Macnaghten in summarizing the doctrine of a corporate entity categorically declared that

When the memorandum is duly signed and registered...the subscribers are a body corporate ‘capable forthwith’, to use the words of the enactment, ‘of exercising all functions of an incorporated company’... The company attains maturity on its birth. There is no period of minority... The company is at law a different person altogether from the subscribers of the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and manner prescribed by the Act.<sup>101</sup>

As a consequence of the concept of separate legal personality of the corporation, a corporation is recognised by law to have a separate legal existence and status, with a legal name, legal rights, duties, privileges, responsibilities, assets, or liabilities, very much in a similar manner as a natural person. To this end, Lord Halsbury declared in *Salomon’s case*

...once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself.<sup>102</sup>

Furthermore, the separate legal personality of a corporation is also established under section 15 Companies Act 2006.<sup>103</sup> The effect of section 15 is that the subscribers of the memorandum, as well as such other persons as may from time to time become

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<sup>101</sup> At 51.

<sup>102</sup> Para 30.

<sup>103</sup> Section 15 prescribes that upon registration of a company, the certificate of incorporation which is given as a certification of incorporation, is conclusive evidence that the requirements of the Act have been satisfied, and the company is duly registered under the Act. See Section 15(1)&(4) Companies Act 2006 [CA 2006].

members of the company are ‘a body corporate’ by the name contained in the certificate of incorporation.<sup>104</sup> Thus, the concept of a corporation is one which is a distinct legal person – the body corporate – with a separate existence from its membership and management team.<sup>105</sup> It may be run by only one individual who may be the corporation’s sole employer, its governing director, as well as its controlling shareholder; nonetheless, this does not make that individual the corporation. As indicated by Lord Wrenbury in *Macaura v Northern Assurance Co Ltd*<sup>106</sup>

...the corporator even if he holds all the shares, is not the corporation.<sup>107</sup>

Although the courts accept and uphold the concept of separate legal personality which places a veil of incorporation on the corporation, metaphorically speaking, there are circumstances where the courts disregard the accruing privilege of separate corporate personality, and treat the rights or liabilities of a corporation as those of the shareholders, consequently bringing about personal liability. This may be called ‘lifting’, ‘piercing’, ‘setting aside’, or ‘going behind’ the veil of incorporation.<sup>108</sup> These exceptional circumstances under which the veil may be lifted include cases under common law; and by statute. Under common law, the veil may be lifted in the case of agency,<sup>109</sup> sharp practice and fraud,<sup>110</sup> quasi-partnerships,<sup>111</sup> national emergency,<sup>112</sup> or where the existence of a single economic unit is proved.<sup>113</sup> The courts

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<sup>104</sup> See Section 16 CA 2006.

<sup>105</sup> See generally Griffin, S. *Company Law: Fundamental Principles*. 4<sup>th</sup> ed. Essex: Pearson Education Limited, 2006; French, D., Mayson, S., and Ryan, C. *Company Law*. 24<sup>th</sup> ed. New York: Oxford University Press Inc., 2007.

For an analysis of the history and development of the registered company, see generally Farrar, J. and Hannigan, B. *ibid*; Griffin, S. *Company Law: Fundamental Principles*. 4<sup>th</sup> ed. Essex: Pearson Education Limited, 2006; Birds, J., Boyle, J., Clark, B., MacNeil, I., McCormack, G., Twigg-Flesner, C. and Villiers, C. (eds) *Boyle & Birds’ Company Law*. 8<sup>th</sup> ed. Bristol: Jordan Publishing Limited, 2011.

<sup>106</sup> *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

<sup>107</sup> At 633. This principle has been further established by the CA 2006 which states under Section 7(1) that a company may be formed by one individual.

<sup>108</sup> See French, D., Mayson, S., and Ryan, C. *ibid*, 122.

<sup>109</sup> Such as where a company is found to be acting as an agent for its shareholders. See *Smith Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.

<sup>110</sup> See *Gilford Motor Co Ltd v Horne* [1933] Ch. 935. See also *Jones v Lipman* [1962] 1 WLR 832.

<sup>111</sup> The veil may be dislodged by the courts to take into consideration the understanding and agreements between the members concerning the management and control of the company at the time of formation. See *Ebrahimi v Westbourne Galleries Ltd* [1972] All ER 492.

<sup>112</sup> The veil may be dislodged in circumstances of national emergency, such as war. See *Daimler Co Ltd v Continental Tyre & Rubber Co* [1916] 2 AC 307.

<sup>113</sup> Here, the separate legal personalities of a group of companies could be ignored, and the group treated as a single unit if there is an indication that the veil was used as a mere façade concealing true

may also dislodge the corporate veil in the case of criminal responsibility, where one attributes to a corporation the acts and knowledge of its ‘directing mind and will’ – that is, its management.<sup>114</sup> Under statute, the veil may also be lifted by section 24 CA 1985, section 117 CA 1985 replicated in section 767 CA 2006, section 349 CA 1985, section 15 Company Directors Disqualification Act 1986, section 122 Insolvency Act 1986, section 213 Insolvency Act 1986, section 214 Insolvency Act 1986.

By the above account, therefore, a corporation is established as a separate legal personality. The consequence of this separate legal personality is that the corporation upon incorporation is brought to life,<sup>115</sup> has perpetual succession,<sup>116</sup> can sue and be sued in its own name,<sup>117</sup> can own its own property,<sup>118</sup> can enter into contracts,<sup>119</sup> and can die upon its winding up.<sup>120</sup> Furthermore, the corporation by virtue of its incorporation is empowered by the CA 2006, irrespective of being a non-natural *person*, to a distinct legal existence recognised by law with legal rights, duties, privileges, responsibilities, assets, or liabilities, very much in a similar manner as any other natural person. This illustrates the capacity the corporation has, as a non-natural person with legal personality, and the manner in which the courts have treated the separate personality of corporations, which is akin to a natural person save for exceptional circumstances which have been examined above. To this end, it therefore follows that the corporation has the capacity to enjoy certain rights and privileges which are enjoyed by the natural person.

Consequently, it may then be asked: does this apply to privacy? If a corporation has such rights which enable it to come to life with its registration, have a name, enter into contracts with this name, sue and be sued in its own name, have members, own property, and cease to exist when it is wound up; it is reasoned that one may question: can the corporation also have a right to its privacy to carry on certain activities within

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facts. See *Woolfson v Strathclyde Regional Council* [1978] SLT 159; *Adams v Cape Industries Plc* [1990] Ch. 433.

<sup>114</sup> See *Tesco Supermarket Ltd v Natrass* [1972] AC 153.

<sup>115</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22.

<sup>116</sup> *Re Noel Tedman Holdings Property Ltd* [1967] QdR 561. However, its existence comes to end when the company is wound up in accordance with the CA 2006. See Part 31 CA 2006.

<sup>117</sup> *Foss v Harbottle* [1843] 2 Hare 461.

<sup>118</sup> *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

<sup>119</sup> *Lee v Lee's Air Farming Ltd* [1961] AC 12.

<sup>120</sup> That is to say, where it goes into liquidation and subsequently ceases to exist. For companies insolvency and liquidation, see generally the Insolvency Act 1986.

its establishment? To which the question ensues: what does privacy mean for the corporation?

In seeking to examine this question, the investigation of this chapter proceeds to test the three following key concepts of the privacy of the individual on the corporation, as set out at the beginning of this part of this chapter:

- Privacy interests: the intrusion privacy interests and information privacy interests are tested on the corporation
- Definition of privacy: the definitions of privacy of the individual which reflects the two above privacy interests are also tested to investigate whether they may apply to the corporation
- Rationales for the privacy: the two independent rationales for the privacy of the individual are tested on the corporation. In making this examination, therefore, the dignity and autonomy rationales of the privacy of the individual are tested on the corporation to investigate whether they may apply to the corporation.

These tests are undertaken to demonstrate that the concept of privacy also applies to corporations; and that corporations do have privacy aspects which are worthy of protection in English law.

### **Privacy interests**

In developing a definition of privacy for corporations as part 3 of this chapter has set out to achieve, it is suggested that the next step, having defined the notion of the corporation, is to inquire whether corporations have the privacy interests of intrusion privacy and information privacy, from which the definition of privacy ensues; and if so, how they apply. This section therefore tests these two interests and illustrates how they occur in the case of the corporation.

#### **Intrusion privacy interest**

The intrusion interest of the individual, as discussed in part 1, above, involves freedom from unwanted access or disturbance or interference or surveillance into *one's private sphere* – a sphere in which an individual is free to carry on his activities – and this includes unwanted access or disturbance or interference or surveillance into one's

*physical space*, one's *home*, or one's *property*. Does this apply to corporations? Can the corporation's premises be deemed its space, its home or its property; and if so, then can it be subject of unwanted access or disturbance or interference or surveillance – that is to say, intrusion?

It is argued that the corporation's premises can be deemed its home or property which represents its own space. This is supported by the jurisprudence of the European Court of Human Rights which declares in a host of cases that the protection of private life and the home as provided for in Article 8 ECHR has to be respected, and extends to the premises of commercial companies.<sup>121</sup> To this end, in the case of *Societe Colas Est v France*,<sup>122</sup> it has been established that 'on a dynamic interpretation of the ECHR, the right to *home* as guaranteed by Article 8 ECHR may be construed as including the right to respect for a company's registered office, branches or other business premises'.<sup>123</sup> It is also noted that in an earlier case, *Niemietz v Germany*,<sup>124</sup> the notion of 'private life' and 'home' under Article 8 ECHR was interpreted as including certain business activities and business premises.<sup>125</sup> Furthermore, Lord Woolf MR in *R v Broadcasting Standards Commission ex parte BBC*<sup>126</sup> in reiterating the statement of the Advocate General in the Court of Justice of the European Communities case of *Hoechst AG v Commission of the European Communities*<sup>127</sup> noted that 'a general trend was discernible in the national legal systems of member states of the European Union towards the assimilation of business premises to a home'.<sup>128</sup>

It is therefore reasoned that having been settled by the law that a corporation's premises or property may be deemed its home, it follows that an unwanted access into a corporation's home or premises or property may constitute an intrusion into its own space. This submission is supported by the jurisprudence of the European Court of

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<sup>121</sup> Discussed in chapter 3.

<sup>122</sup> *Societe Colas Est v France* [2004] 39 EHRR 17. This case is fully discussed in chapter 3.

<sup>123</sup> Para 41. See also *Buck v Germany* [2006] 42 EHRR 21, para 31; *Sallinen v Finland* (2007) 44 EHRR 18, para 70; *Agrofert Holdings AS v European Commission* [2011] 4 CMLR 6, para 76; *Conseil National de L'Ordre des Pharmaciens (CNOP) v European Commission* [2013] 4 CMLR 27, para 40; *Schenker North AB v EFTA Surveillance Authority* [2013] 4 CMLR 17, para 110. See also in chapter 3.

<sup>124</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

<sup>125</sup> Para 29 and 30 respectively. This case is fully discussed in chapter 3.

<sup>126</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885. This case is fully discussed in chapter 2.

<sup>127</sup> *Hoechst AG v Commission of the European Communities* [1991] 4 CMLR 410. This case is discussed in chapter 3.

<sup>128</sup> Para 10.

Human Rights as illustrated in the case of *Societe Colas Est v France*,<sup>129</sup> in which the court established that ‘entry into a corporation’s premises for inspection, without judicial authorization, and the search and seizure of various documents containing evidence unrelated to the inspection in issue, constitutes *intrusion* into a corporation’s home’.<sup>130</sup>

Equally, the submission that an unwanted access into a corporation’s home or premises or property may constitute an intrusion into its own space is also made because in looking at instances of intrusion on the individual as illustrated in part 1 of this chapter above, with such examples as the surreptitious prying on an individual, the search of an individual, his home, or his property, the seizure ensuing from the search, the hacking into an individual’s telephone or computer; it could be argued that these are instances of intrusion which may similarly occur in the case of the corporation. To this end, a corporation’s private sphere – that is to say, its home or premises or property which represents its physical space – may be subject to unwanted surreptitious spying.<sup>131</sup> In the case of surreptitious spying on an individual, it is the individual person that is the subject of interest of the peeping Tom, while in the case of surreptitious spying on a corporation, it is the corporation’s physical sphere, which is its home or premises or property, that is the subject of the surreptitious spying. Likewise, the corporation’s home or premises or property may be subjected to an unwanted search and seizure of its property or documents.<sup>132</sup> Similarly, the corporation’s property such as its telephone or computer may be the subject of an unwanted hacking. Other instances of intrusion on the corporation may include the unwanted entry into, and clandestine listening to the activities of a board meeting, or surreptitious spying into the corporation’s correspondence.<sup>133</sup> Indeed, corporations may well wish to keep their property free from intrusion.<sup>134</sup>

Accordingly, intrusion in the case of the corporation entails freedom from unwanted access or disturbance or interference or surveillance into the corporation’s private sphere – a sphere in which the corporation is free to carry on its activities – and this

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<sup>129</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>130</sup> Para 46.

<sup>131</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

<sup>132</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>133</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

<sup>134</sup> See Hale LJ in *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885, para 42.

includes unwanted access into the corporation's home, or property, which represents its space. It is therefore submitted that the intrusion interest of privacy is one which also applies to corporations; furthermore, an affront on the legal personality of a corporation may constitute injury to its personality, albeit legal.

#### Information privacy interest

The information privacy interest of the individual as discussed in part 1 above involves the protection of private information from unwanted dissemination or publication – it protects against the misuse of private information. Does this apply to corporations? Can the corporation be deemed to have information which may be held to be private, and thereby be subject to the information privacy interest?

The typical information of the corporation which is protected in English law is its commercial confidential information, such as its technical secrets and business secrets.<sup>135</sup> However, it is submitted that there are situations in which certain information concerning the business of the corporation, that is to say, its commercial confidential information, transmutes into the private information sphere. In such situations, this sort of information becomes subject to the information privacy interest. The transmutation from the commercial sphere to the private sphere occurs through the manner in which the corporation's commercial information is handled; and this is illustrated in such instances as follows:

a. The contents of certain information ensuing from the corporation's meetings or obtained from the minutes of such meetings; such as, information ensuing, for instance, from meetings where the internal rules and procedures, or policies of the corporation are deliberated. In this case, if the press surreptitiously obtains such information and publishes it, this may be held as the publication of the private information of the said corporation; and as such, this action would become subject of the information privacy interest.<sup>136</sup>

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<sup>135</sup> These include such secrets as special methods of construction, secret processes of manufacture, secret recipes, copies of lists of customers, costs and prices lists, names and telex addresses of manufacturers, as well as information about the management of a business, and its plans for the future. This is discussed under the traditional action for breach of confidence in part 1 of chapter 2.

<sup>136</sup> See generally, Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967. Westin suggests that this sort of information of the corporation is subject to privacy.

b. Information ensuing from certain documents of the corporation, such as, documents on its policies, certain negotiations with other corporations, or its decisions. It may be that the corporation may not want to divulge the contents of this information before a given time. If the press, however, surreptitiously obtain and divulge the contents of this information to the public against the corporation's wishes, this may be held as the publication of the corporation's private information; and as such, this action would become subject of the information privacy interest. An instance of this sort of information may be information involving merger negotiations.<sup>137</sup>

c. Likewise, the contents of information ensuing, for instance, from the corporation's internal correspondence. For instance, where there is internal correspondence between a corporation and its staff, or between a corporation and its subsidiary regarding the use of its products. In this case, the director of the subsidiary may be writing to the head office to consult or make recommendations on the effectiveness of one of the corporation's products. If this internal correspondence is surreptitiously obtained by the press, and published, it is suggested that this act by the press may be held as the publication of the private information of the said corporation; and therefore become subject of the information privacy interest.<sup>138</sup>

d. Furthermore, such other information, obtained, for instance, through the surreptitious surveillance and filming of the corporation's private areas such as its bathrooms, toilets,<sup>139</sup> or information regarding the general standards of care within a corporation.<sup>140</sup> If the details of these sorts of information are published by the press, this may be held as the publication of the corporation's private information; and as such, this action would become subject of the information privacy interest.

From the above, therefore, it is accordingly submitted that corporations do have private information which may result from its business activities, which it may wish to keep private, and the contents of which it may well wish to protect from unwanted publication or dissemination. It is further submitted that the publication or dissemination of the private information obtained, for instance, through hacking into

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<sup>137</sup> Ibid.

<sup>138</sup> This is discussed in *Schering Chemicals v Falkman Ltd* [1982] QB 1, under the traditional action for breach of confidence, in part 1 of chapter 2.

<sup>139</sup> This is discussed in *BKM Ltd v BBC* [2009] EWHC 3151, under the traditional action for breach of confidence, in part 1 of chapter 2.

<sup>140</sup> This is discussed in part 1 of chapter 2 in *Lakeside Homes Ltd v BBC* [2000] WL 1841602.



the corporation's computer or telephone, or through clandestine filming or zoom lens technology, or other clandestine means, would engage the information privacy interest. As such, the information privacy interest is one which applies to corporations. The focus of the information privacy interest is on the dissemination or publication of private information resulting from an interference or disturbance – an intrusion.

Indeed, the transmutation of information from commercial to private may be inferred to be demonstrated in the European Commission's understanding of privacy. In its impact assessment on the protection of undisclosed business information against *unlawful acquisition, use and disclosure*,<sup>141</sup> the European Commission in indicating that the case law of the European Court of Human Rights on the right to privacy of the natural or legal person has been recognised by the European Court of Justice, declared

As a result, an economic actor who protects valuable information through secrecy (i.e. as a trade secret) is indeed exercising [its] right to private life and, as a result, a misappropriation of a trade secret constitutes an intrusion into/interference with such right.<sup>142</sup>

With regard to the transmutation of corporation's information from commercial to private, the above declaration, in view of the title of the report, seems to suggest that the misappropriation of a trade secret – *unlawful disclosure* – through for instance, publication or dissemination, constitutes an interference with the right to privacy.<sup>143</sup>

Furthermore, that corporations do have information which is held to be private in nature accords with the declarations of Woolf MR and Hale LJ in *R v Broadcasting Standards Commission ex parte BBC*.<sup>144</sup> In this case, programme makers for a broadcasting company secretly filmed transactions in plaintiff's store without the plaintiff's permission. The plaintiff, DSG Retail Ltd, made a complaint to the Broadcasting Standards Commission (the BSC) that the secret filming had been an

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<sup>141</sup> European Commission's Impact assessment on the Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 28/11/2013 @<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0471:FIN:EN:PDF> Accessed on 14/02/2014.

<sup>142</sup> Page 248.

<sup>143</sup> The intrusion aspect seems to have also been recognised in the title '*unlawful acquisition*' as distinct from '*disclosure*'.

<sup>144</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

unwarranted infringement of its privacy within sections 110 and 111 of the Broadcasting Act 1996.

The BSC found that the secret filming had infringed the plaintiff's privacy and that the infringement was unwarranted and as such upheld the complaint. On application for judicial review by BBC, the court of first instance reversed the finding of the BSC on the grounds that a corporation did not have a right to privacy and as such could not complain of an infringement of privacy. This decision was unanimously overturned at the Court of Appeal which held that under the Broadcasting Act 1996, a company could make a complaint of unwarranted infringement of its privacy, and as such, the BSC had been entitled to conclude that secret filming of transactions in the plaintiff's stores was an infringement of the plaintiff's privacy. Accordingly, the Court of Appeal restored BSC's adjudication.

In the course of its judgment, Hale LJ stated that 'there are many things which corporations may wish to keep private such as its property, its meetings and its correspondence'.<sup>145</sup> Furthermore, Lord Woolf MR declared that 'while the infringements into the privacy of an individual are no doubt more extensive than the infringements of privacy which are possible in the case of a corporation, a corporation does have activities of a private nature which need protection from unwarranted interference, such as its correspondence, which it could justifiably regard as private and which the unwanted broadcast of the contents would amount to an interference with the corporation's privacy'.<sup>146</sup> Although this case dealt with matters concerning broadcasting under the Broadcasting Act 1996, nevertheless Lord Woolf MR in concluding the case declared that 'to hold such an action as an infringement of privacy could not possibly be held to be in conflict with the ECHR'.<sup>147</sup>

Consequently, corporations do have a legitimate claim to the privacy interests of intrusion privacy and information privacy. These two fundamental privacy interests, which are the hallmark of what privacy represents, apply to the corporation and are worthy of protection in English law. These two fundamental privacy interests,

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<sup>145</sup> Para 42.

<sup>146</sup> At para 33.

<sup>147</sup> At para 33. This case is fully discussed in the last part of chapter 2 under *The Broadcasting Act 1996*.

independent of each other may result in a loss of the corporation's privacy; thus a privacy action may be brought where an intrusion has occurred independent of the misuse of private information.<sup>148</sup> For a privacy action to be successful, however, the claim to privacy by the corporation must be balanced against the right to freedom of expression, in the case of the press;<sup>149</sup> in the case of interference by a public authority, such interference must be in accordance with law and necessary in a democratic society.<sup>150</sup>

### **Definition of privacy**

Having found that the intrusion and information privacy interests apply to corporations, this section proceeds to test the definitions of the privacy of the individual on the corporation and thereafter develop a definition of privacy for corporations.

As has been stated above, privacy grew out of the basic need for the protection of the individual; and as such, in a majority of cases, the infringement of privacy often concerns the individual. This focus on the individual can be seen in the definitions of Warren and Brandeis,<sup>151</sup> in which they argued for the individual's right to be let alone without intrusion into the sacred precincts of his private and domestic life. This is also seen in Prosser's,<sup>152</sup> Fried's,<sup>153</sup> Gavison's,<sup>154</sup> and Parent's<sup>155</sup> definitions above. However, as has been indicated above, there are situations in which privacy is arguably a notion which may extend beyond the individual's realm to also apply to corporations. To this end, it is suggested that the definitions of privacy as a right to be free from unwanted intrusion<sup>156</sup> such as regular surveillance and surreptitious spying,<sup>157</sup> or the ability to lead life without interference to home life,<sup>158</sup> or public

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<sup>148</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>149</sup> Article 10 ECHR. This is discussed in chapter 3 and 5.

<sup>150</sup> Article 8(2) ECHR. This is discussed in chapter 3 and 5.

<sup>151</sup> Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890:4(5), 193-220.

<sup>152</sup> Prosser, W.L. Privacy. *California Law Review*. 1960: 48, 383-423.

<sup>153</sup> Fried, C. Privacy. *Yale Law Journal*. 1968: 77(3), 475-493.

<sup>154</sup> Gavison, R. Privacy and the Law. *The Yale Law Journal*. 1980:89(3), 421-471.

<sup>155</sup> Parent, W.A. Privacy, Morality, and the Law. *Philosophy and Public Affairs*. 1983:12, 269-288.

<sup>156</sup> Prosser, W.L. Privacy. *California Law Review*, 1960: 48(3), 383-423. See also Cornish, W., Llewelyn, D. and Aplin, T. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. 8<sup>th</sup> edn. London: Sweet & Maxwell, 2013.

<sup>157</sup> Cornish, *ibid*.

<sup>158</sup> Parker, R. B. A Definition of Privacy. *Rutgers Law Review*. 1974: 27, 275-296.

disclosure of private facts,<sup>159</sup> or misusing private communications and correspondences,<sup>160</sup> are, in the light of such cases as *Broadcasting Standards Commission ex parte BBC*,<sup>161</sup> *Niemietz v Germany*,<sup>162</sup> and *Societe Colas Est v France*,<sup>163</sup> instances of privacy of the individual which are likewise applicable to corporations.

The recognition of the possibility of privacy applying to corporations has not been one which has received much acceptance from scholars. An arguably lone recognition of this possibility was highlighted in Westin's<sup>164</sup> definition in which he recognised four basic states of privacy which were exclusive to the individual;<sup>165</sup> but nevertheless envisaged a situation in which a claim to privacy of information would advance beyond the realm of the natural person, and extend into the realm of non-natural persons such as organisations. Westin contended that the legitimate claim to privacy given to organisations and groups are more than the mere protection of the collective privacy rights of the members as individuals. Westin<sup>166</sup> acknowledged that organisations, just as individuals, need the right to decide when and to what extent their actions and decisions should be made public, notwithstanding the fact that it is a separate entity that has an organisational purpose, internal rules, and procedures.<sup>167</sup>

Thus, in examining the first limb of my own definition of the privacy of the individual in relation to the corporation, it is submitted that in accordance with my definition,<sup>168</sup> privacy for corporations may be defined in a similar manner; that is, as the state in which the corporation wishes to be free from unwanted interference or disturbance – intrusion – into its private sphere, and this includes its home or its property which

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<sup>159</sup> Prosser, W.L. Privacy. *California Law Review*, 1960: 48(3), 383-423.

<sup>160</sup> Parker, R. B. A Definition of Privacy. *Rutgers Law Review*. 1974: 27, 275-296.

<sup>161</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885. This case established that a corporation can suffer intrusion into its premises, where filming of the premises of the complainant was obtained by surreptitious spying; it also established that the corporation has private activities which it may wish to keep away from publicity. This case is discussed in detail in chapter 2.

<sup>162</sup> *Niemietz v Germany* [1993] 16 EHRR 97. This case established privacy as applicable to certain business activities or premises. This case is discussed in detail in chapter 3.

<sup>163</sup> *Societe Colas Est v France* [2004] 39 EHRR 17. This case established that the corporation's premises or property may be deemed its home which may suffer from intrusion where surveillance {by way of the search of the premises} is conducted. This case is discussed in detail in chapter 3.

<sup>164</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967.

<sup>165</sup> They are solitude, anonymity, reserve, and intimacy.

<sup>166</sup> Ibid.

<sup>167</sup> Adding that the term 'organisation' as used include, *inter alia*, corporations.

<sup>168</sup> See in part 1 of this chapter.

represents its own space. In this definition, the corporation's premises is referred to as its home on the strength of the principle established by the European Court of Human Rights in *Societe Colas Est v France*.<sup>169</sup>

Although the corporation may wish to be free from intrusion into its home or property, to the extent where privacy involves a desire to retreat into the halls of one's own sanctuary or seclusion so as to enjoy a variety of states without unwanted intrusion, such as solitude, anonymity, reserve, and intimacy, this is an aspect of privacy which is specific to the individual. Likewise, it is also noted that to the extent where privacy involves freedom from intrusion into a corporation's home or property, for instance, through surveillance or surreptitious spying on the corporation by press agents, or other corporations' agents, or by means of entry, search, and seizure effected on the corporation by public authorities; this is an aspect of privacy which is specific to the corporation.

Furthermore, in examining the second limb of my definition of the privacy of the individual in relation to the corporation, it is submitted that privacy for corporations may be defined in a similar manner; that is, as a claim to the control of the corporation's private information from being released into the public domain against the corporation's wishes, thus protecting the said information from unwanted dissemination or publication.

Therefore, privacy for the corporation is defined in two limbs: first, as the state in which the corporation wishes to be free from unwanted interference or disturbance – intrusion – into its private sphere, and this includes its home or its property which represents its own space; and secondly, as a claim to the control of the corporation's private information from being released into the public domain against the corporation's wishes, thus protecting the said information from unwanted dissemination or publication.

In suggesting that privacy is a matter which may concern natural persons and non-natural persons alike, with the fundamental interests of intrusion privacy and information privacy present in the case of individuals as well as corporations, it is

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<sup>169</sup> *Societe Colas Est v France* [2004] 39 EHRR 17. This principle has been reiterated and upheld in a host of cases, and will be analysed in chapter 3.

however noted that the privacy of the natural persons differs in kind from that which is applicable to the corporation.<sup>170</sup> Nevertheless, privacy for individuals as well as corporations involves the protection against intrusion into the private sphere, as well as a claim to the control of private information from being released into the public domain against the one's wishes; thus protecting the said information from unwanted dissemination or publication.

This two limbed definition is of importance as it incorporates the fundamental privacy interests of intrusion privacy and information privacy, which are the hallmark of what privacy represents.

### **Rationales of privacy**

In trying to further appreciate and better understand the notion of privacy for the corporation, the two independent rationales for the privacy of the individual – dignity and autonomy – are tested on the corporation.

#### **Dignity rationale**

It is suggested that an affront to the personality of the individual may constitute an injury to it. This injury which may bring on hurt feelings, distress, humiliation, shame or unworthiness, is protected by the dignity rationale of privacy. Dignity, as an essential value of privacy, protects against the feelings of loss of respect which the above emotions may bring on. To this end, the privacy rationale of dignity can be enjoyed by the individual alone. It cannot be enjoyed by the corporation because the corporation does not have human feelings which can be injured in the manner described above; and as such, is not subjected to the emotions an individual goes through when his privacy is infringed.

#### **Autonomy rationale**

It was established in part 2 of this chapter that the autonomy rationale underpins the protection of the individual's privacy. More specifically, the ability of an individual to decide whether, when to, or when not to allow access into his private sphere which

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<sup>170</sup> This is illustrated in chapter 3, in which the notion of privacy for the corporation under Article 8 ECHR is held to comprise the protection of the corporation's private life, home and correspondence; unlike that of the individual which encompasses private life, family life, home and correspondence.

includes his physical space, his home or his property – the right to protect against unwanted intrusion – is a function of the autonomy of that individual. Equally, it was held to be the function of the individual's autonomy to decide whether, when to, or when not to disclose information about himself, as well to control the dissemination or publication of such information.

Consequently, it may be questioned: does this exercise of autonomy apply only to natural persons? Can a corporation also exercise autonomy against unwanted intrusion into its home or property, as well as in the protection of its private information? And if so, does that then suggest that the autonomy rationale also applies to the corporation?

It is argued that the ability of the corporation to be in a state free from unwanted intrusion into its home or property, as well as its claim to the control of its private information from unwanted dissemination or publication, are brought on by its ability to exercise autonomy in a given situation. The function of this autonomy gives the corporation, as a non-natural person, the power and control to make a choice in deciding who to grant access into its premises or its property, as well as who to disclose its private information to.

The autonomy rationale enables corporations the required privacy to carry out its work away from the public view. As Westin<sup>171</sup> stated

Just as with individuals, and subject to the same process of social limitations, organizations [including corporations] need the right to decide when and to what extent their acts and decisions should be made public.<sup>172</sup>

It is noted, as indicated by Westin<sup>173</sup> that the claim to privacy by organizations, including corporations, is much more than just the protection of the collective privacy rights of its members as individuals. He further indicated that just as in the case of the individual, corporations also have the same basic need to be free from constant and immediate public exposure. As such, corporations also have a legitimate claim to resist

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<sup>171</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967.

<sup>172</sup> At 42. The term organization was defined by Westin as including corporations.

<sup>173</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967, 42.

unwanted intrusions into its privacy. The lack of privacy for the corporation can threaten the autonomous and independent life of a corporation.<sup>174</sup>

As concluded by Westin,

The foregoing discussion of organizational behaviour suggests that privacy is a necessary element for the protection of organizational autonomy, gathering of information and advice, preparation of positions, internal decision making, inter-organizational negotiations, and timing of disclosure. Privacy is thus not a luxury for organizational life; it is a vital lubricant of the organizational system in free societies.

In view of the above argument, as supported by Westin's<sup>175</sup> declarations, it is submitted that a corporation can exercise autonomy in its home or property against unwanted intrusion and in the protection of its private information from dissemination or publication; and the corporation's ability to exercise autonomy in its private sphere suggests that the autonomy rationale of privacy also applies to the corporation. The autonomy of the corporation in this regard is fundamental to the effective functioning of the corporation in a democratic society.

It is however indicated that the right of the corporation to exercise autonomy in the running of its affair is subject to social limitations, so for instance, the corporation, just like the individual, cannot plead privacy to cover up fraud or other unlawful acts, such as tax evasion. If an illegitimate claim for autonomy by a corporation occurs, then the public authority would have the power to lawfully interfere with that corporation's autonomy; equally, the press would have a genuine public interest to report on the case. Nevertheless, this ought not to discourage legitimate claims by the corporation to the protection of its autonomy in privacy.

Furthermore, it is acknowledged that over-concealment, by the corporation, of its property or private information may threaten legitimate public interest; equally, over-exposure of private information of corporation by the press may bring about the abuse of Article 10 ECHR which is subject to regard for 'the rights of others'. Similarly, interference with the corporation's privacy by public authorities must be in accordance

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<sup>174</sup> Westin, A. *Privacy and Freedom*. New York: Association of the Bar, 1967.

<sup>175</sup> Westin, *ibid*.



with the law and necessary in a democratic society. Therefore, the argument for autonomy in the privacy of the corporation must be subject to the balance between privacy and disclosure, with great emphasis on freedom of the press as well as disclosure based on public interest; however, it ought not to eliminate the legitimate claim for the privacy of the corporation. Just as the balancing exercise in the argument for privacy protection for the corporation will also act as a check on certain activities of the corporation, it would likewise act as a check on the excessive use of power by public authorities; furthermore, it will as well act as a check on the excessive use of the freedom granted the press by law.

From the testing of the rationales of privacy of the individual on the corporation, as has been demonstrated above, the dignity rationale is exclusive to the individual, while the autonomy rationale applies to the corporation as it does to the individual. It is suggested that this does not deny the corporation the proposition for privacy protection in English law. Indeed, it is not unusual for a cause of action to have various rationales which apply to it, with a certain rationale applicable to the individual as well as the corporation, and other rationales applicable to the individuals alone. This is illustrated in the tort of defamation which protects the natural as well as non-natural person such as a corporation, where injury has been suffered as a result of a false attack on the reputation, character or good name.<sup>176</sup>

The three rationales which may explain the concept of reputation under defamation are identified as interests in dignity, honour, and property.<sup>177</sup> On the dignitary interest, dignity is regarded as an interest in reputation on the basis that ‘the right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflected no more than the basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty’.<sup>178</sup> The injury suffered arises from and deals with the damage to the reputation – the

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<sup>176</sup> See generally, Post, R. The Social Foundations of Defamation Law: Reputation and the Constitution. *California Law Review*. 1986: 74, 691-742.

<sup>177</sup> See Post, R. The Social Foundations of Defamation Law: Reputation and the Constitution. *California Law Review*. 1986: 74, 691-742; Oster, J. The Criticism of Trading Corporations and their Right to Sue for Defamation. *Journal of European Tort Law*. 2011: 2(3), 255-279, 259.

<sup>178</sup> Post, *ibid*, at 707, citing Justice Stewart in the US Supreme Court case of *Rosenblatt v Baer* [1966] 383 US 75, 92.

unwarranted violation of ‘one’s standing among his fellow-men’.<sup>179</sup> The legal remedy in such a case seems to involve the treatment of the injury done to the individual in his external relations with the community which has subjected him to the hatred, ridicule, or contempt of his fellow men, and which lowers him in the estimation of his fellow men, invariably causing him distress and hurt. Hence, the injury to his reputation, which arguably engages feelings of distress, hurt, and embarrassment.

On the honour interest, the notion of honour as a reputation interest is one in which an individual ‘personally identified with the characteristics normative of a particular social role and in return personally receives from others the regard and estimation that society accords that role’.<sup>180</sup> Honour is regarded as an interest in reputation on the basis that it is ‘a personal reflection of the pre-eminence of an individual in society, therefore to attack it would result in loss of the individual’s honour and pre-eminence’.<sup>181</sup>

On the property interest, where a person suffers injury as a result of false attack on his reputation or good name, this false attack on the reputation may be regarded as a property interest – a form of intangible property – on the basis that one’s good name and reputation are deemed one’s property which has been cultivated over time. Hence to attack or injure it without justification is to unjustly destroy the reputation.<sup>182</sup>

Pursuant from the above, therefore, it is suggested that where the corporation seeks remedy through defamation, the dignity and honour rationales do not apply to it because the feelings associated to the said rationales such as feelings of pain, hurt, distress, loss of honour and pre-eminence, are arguably feelings which can only be felt by the individual; to this end, only the individual may rely on these two rationales. It is further argued that when the corporation seeks remedy through defamation, it is on the basis of the property rationale – on the basis that the corporation’s good name and reputation are deemed the corporation’s property.<sup>183</sup> It thus follows that the different

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<sup>179</sup> Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220, 194. See generally Descheemaeker, E. Protecting Reputation: Defamation and Negligence. *Oxford Journal of Legal Studies*. 2009, 29(4), 603-641.

<sup>180</sup> Post, *ibid*, 700.

<sup>181</sup> Post, *ibid*, 699, 703.

<sup>182</sup> Post *ibid*, 693-694.

<sup>183</sup> This accords with the position in Oster, J. The Criticism of Trading Corporations and their Right to Sue for Defamation. *Journal of European Tort Law*. 2011: 2(3), 255-279. The individual may also rely on this rationale.

rationales of defamation support the different claims to defamation depending on the persons involved, to the end that the individual may claim an interest in the dignitary, honour or property rationale, whilst the corporation may only claim to have an interest in the property rationale. That only one rationale – the property rationale – supports the corporation’s claim under defamation, does not result in the corporation not being able to claim for the protection against defamation.

Likewise, in the case of privacy, it is suggested that the privacy rationales of dignity and autonomy are also engaged depending on the nature of the claimant; such that the dignity rationale of privacy may be claimed by the individual alone, for reasons noted above, while the autonomy rationale serves the corporation as well as the individual, as has already been submitted. As illustrated in the case of defamation; in privacy cases, that only one rationale – the autonomy rationale – supports the corporation’s claim under privacy, ought not to result in the corporation not being able to claim for the protection against violations of its privacy.

Accordingly, it is submitted that although only one rationale of privacy is engaged in the case of the corporation, this does not deny the corporation the proposition for privacy protection in English law. This accords with the views of scholars such as Bloustein,<sup>184</sup> Warren and Brandeis,<sup>185</sup> and Neill,<sup>186</sup> who although referring to the individual’s privacy protection, nevertheless, defined the rationale of privacy solely on a single rationale. It also accords with the position of the law in the rationales of reputation under corporate defamation. As submitted in Part 2 above, the rationales of privacy may be pleaded independently, or in conjunction with one another; and as a result, the privacy of the corporation is fully supported by the autonomy rationale alone.

From the above, therefore, it has been illustrated that privacy also applies to corporations; corporations do have privacy interests – the intrusion privacy interests and information privacy interests – which are worthy of protection in English law. It

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<sup>184</sup> Bloustein, E.J. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. *New York University Law Review*. 1964: 39, 962-1007.

<sup>185</sup> Warren, S.D. and Brandeis, L.D. The Right to Privacy. *Harvard Law Review*. 1890: 4(5), 193-220.

<sup>186</sup> Neill, B. A Challenge for the Next Century in Markensins, B.A. (ed) *Protecting Privacy*. Oxford: Oxford University Press, 1999.

has also been illustrated that the definitions of privacy for the individual similarly apply to the corporation to the extent that it involves the protection against intrusion into the private sphere, as well as a claim to the control of private information from being released into the public domain against the one's wishes; thus protecting the said information from unwanted dissemination or publication. Furthermore, it has been illustrated that the independent rationale of privacy for the corporation is the autonomy rationale, and this rationale carries the proposed action for the privacy of the corporation.

It is most important to note that in an argument for the protection of the privacy of the corporation, it is the legitimate acts of the corporation that such protection speaks to. As with other laws protecting the corporation, illegitimate actions will not be shielded by privacy; indeed, as already well-established in company law, the veil of incorporation is not provided by law to shield the corporation from illegality or fraud. As earlier stated, the veil of incorporation will be lifted, pierced, or set aside in cases such as sharp practice and fraud, an instance of this may be found in the evasion of tax by the corporation. Equally, by Section 993(1) CA 2006, on the offence of fraudulent trading, 'if any business of a company is carried on for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that manner commits an offence'. As such, the question of whether English law ought to be further developed to provide fuller protection for the privacy of the corporation, is not to say that the corporation would be absolved from performing its generic responsibilities as a corporation, for instance, the payment of its taxes; neither will the argument for corporation's privacy absolve it from performing its social responsibilities. Just as the claim to privacy by the individual has not amounted to the individual not performing his civic duties in society, likewise, the corporation's claim to privacy protection is argued in the same vein. Besides, as will be demonstrated in chapters 3 and 5, for a claim to privacy to be successful in the case of press interference, such interference must be balanced with Article 10 ECHR freedom of expression, to the end that interference by the press is held not to be in compliance with Article 10 ECHR and not in the public interest. Equally, in the case of public authority interference, for a claim to privacy to be successful, such interference must be balanced with Article 8(2) ECHR, to the end that interference by a public authority is held not to be in accordance

with law nor necessary in a democratic society.<sup>187</sup> Consequently, the reservations which may exist regarding the advancement of the law to provide protection for the privacy of the corporation ought not to deny the corporation or prevent it from receiving effective protection of the law, which is a fundamental right in a democratic society. Thus, the reservations against any further legitimate protection of the corporation ought not cause the corporation not to be effectively protected in a democratic and ever evolving world. It is suggested that as the world evolves, the law ought to effectively evolve with it so as to keep up with the realities of the times.

Accordingly, it is submitted that privacy for the corporation protects the corporation's autonomy to carry on its activities, within the law, and without unwanted interference; in view of this, the corporation ought to be able to lawfully resist the unjustified or unwarranted interferences into its privacy. Indeed, the privacy of the corporation is worthy of protection in English law.

## CONCLUSION

This chapter has illustrated that the individual has two fundamental privacy interests – the intrusion privacy interest and the information privacy interest – upon which a definition of privacy for the individual has been derived. It has also illustrated that the autonomy and dignity rationales are the independent rationales for the protection of the individual's privacy. Furthermore, this chapter has established that the corporation also has the two abovementioned privacy interests. It has defined the corporation's privacy in two limbs, based on these two interests: first, as the state in which the corporation wishes to be free from unwanted interference or disturbance – intrusion – into its private sphere, and this includes its home or its property which represents its own space; and secondly, as a claim to the control of the corporation's private information from being released into the public domain against the corporation's wishes, thus protecting the said information from unwanted dissemination or publication. It has also held that the corporation's privacy, like the individual's privacy, involves the

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<sup>187</sup> Article 8(2) ECHR provides there shall be no interference by a public authority with the exercise of [the right to privacy] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

protection against intrusion into the private sphere, as well as a claim to the control of private information from unwanted dissemination or publication. Equally, this chapter has established that the autonomy and dignity rationales of privacy may be pleaded independently, or in conjunction with one another; and in the case of the corporation's privacy, the corporation is fully supported by the autonomy rationale.

## **CHAPTER 2**

### **THE LEVEL OF PROTECTION OF THE PRIVACY OF THE CORPORATION IN ENGLISH LAW**

#### **INTRODUCTION**

Having established that privacy applies to the corporation and thereto examined the concept of privacy for the corporation in the previous chapter, in investigating whether English law ought to be further developed to provide fuller protection for the privacy of the corporation, this chapter considers the present level of protection of the privacy of the corporation in English law. Accordingly, this chapter through doctrinal analysis undertakes an investigation into the mediums of protection within which the protection of the individual's privacy under English common law were previously sought, as well as the present mediums of protection of certain aspects of the individual's privacy under statute. The aim of this investigation is to identify the level of protection of the corporation's privacy in English law.

To achieve this, this chapter is divided into two parts. Part 1 investigates the common law; hereunder, the traditional action for breach of confidence, [the extended action for breach of confidence is investigated in chapter 3] malicious falsehood, as well as defamation. An investigation is made into whether the traditional action for breach of confidence also protects the privacy of corporations because in addition to being an erstwhile medium of protection for the privacy of the individual, it is also the present medium of protection for the corporation's, as well as the individual's, commercial confidential information – hence the investigation into whether the privacy of the corporation is also therein protected. In addition, malicious falsehood and defamation are investigated because these are causes of action through which the protection of the individual's privacy were previously sought. Part 2 investigates English Statute; hereunder, this chapter investigates the Data Protection Act 1998, Protection from Harassment Act 1997, and the Broadcasting Act 1996. These statutes presently protect specific aspects of the individual's privacy; consequently, this investigation is made to ascertain whether the privacy of the corporation is also therein protected, and if so, to what extent.

From the above investigations, this chapter establishes that of all the mediums examined, the privacy of the corporation is protected only to a limited extent by the Broadcasting Act 1996; consequently, an outline of the aspects of the corporation's privacy which still require protection in English law, and to which the research question is directed at, is made.



## PART 1

### COMMON LAW

#### The traditional action for breach of confidence

The history of the development of the traditional action for breach of confidence is obscure.<sup>188</sup> It has been stated to be ‘pre-eminently a field of law which is known in part and prophesied in part’.<sup>189</sup> However, the traditional action for breach of confidence has its origin in the mid-19<sup>th</sup> century with the *locus classicus* case of *Prince Albert v Strange*.<sup>190</sup> In this case, a workman was intrusted with private copper-plates not intended for publication, but for the purpose of making impressions of etchings for the plaintiff. In violation of the trust, he took the impressions for himself and sold them to the defendant who without the authorisation of the plaintiff published a catalogue of them.

The Court held that the right to property therein had been manifestly invaded through the medium of a breach of trust, and that the invasion entitled the plaintiff under common law to an action for the breach of contract, violation of confidence, and breach of trust. The plaintiff was therefore entitled to a perpetual injunction to restrain the publication of the catalogue and to a decree ordering the impressions to be destroyed. This judgment was upheld on appeal, with the injunction sustained on the same grounds upon which it was originally granted.

It is noted that although matters of confidence had been dealt with before this *locus classicus* case,<sup>191</sup> *Prince Albert’s* case is important because, as stated by Aplin *et al*<sup>192</sup>

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<sup>188</sup> Aplin, T., Bently, L., Johnson, P., and Malynicz, S. *Gurry on Confidence – The Protection of Confidential Information*. Oxford: Oxford University Press, 2012. See also Law Commission *Working Paper on Breach of Confidence*, No 58, Cmnd 8388, 1974; Law Commission *Report on Breach of Confidence*, No 110, 1981.

<sup>189</sup> Finn, P.D. *Fiduciary Obligations*. Sydney: Law Book Co, 1977.

<sup>190</sup> *Prince Albert v Strange* [1849] 2 De G & Sm 652; 1 Mac & G 25.

<sup>191</sup> See *Yovatt v Winyard* [1820] 1 Jaob & Walker 394; 37 ER 425 in which the Lord Chancellor, Lord Eldon, granted an injunction to restrain a defendant from communicating certain recipes for medicines, upon the grounds that the defendant had obtained the knowledge of the mode of preparing them through a breach of trust and confidence.

See also *Abernethy v Hutchinson* [1825] 3 LJ OS Ch 209 which was cited in *Prince Albert’s* case. In *Abernethy’s* case, the Lord Chancellor, Lord Eldon, granted an injunction against third persons publishing lectures orally delivered, who have procured the means of publishing those lectures from parties who attended the oral delivery of them, on the ground that there was an implied contract between the lecturer and the parties who attended his lectures, that they should not publish them.

‘it acknowledges a *distinct* action for breach of confidence, which alongside property and contract, protects confidentiality’. Similarly, Lord Hoffmann in *Campbell v Mirror Group Newspapers*<sup>193</sup> referred to *Prince Albert’s* case as a ‘seminal judgment’. More recently, on the action of breach of confidence, Lord Neuberger MR in *Imerman v Tchenguiz*<sup>194</sup> declared that

The earliest cases on the topic pre-date even the days of Lord Eldon LC. However, the jurisprudence really starts with a number of his decisions and then continues throughout the 19th century. There are many reported cases but it is convenient to start with the celebrated case of *Prince Albert v Strange* (1849) 1 Mac & G 25...<sup>195</sup>

Accordingly, although Prince Albert’s case was not the earliest case in matters of confidence, it is safe to suggest that it is the ‘starting point’<sup>196</sup> of the evolution of the traditional action of the law of breach of confidence.

Furthermore, even though this case initiated what came to be known as the action for breach of confidence, its judgment was arrived at on the basis of property rights. This is illustrated in the declaration of Sir Knight-Bruce VC that ‘the right of property had, in this case, been manifestly invaded through the medium of breach of trust’.<sup>197</sup> Similarly, Lord Cottenham LC reiterated this on appeal, propounding that ‘the case in question depended solely upon the question of property – for breach of trust, confidence, or contract, and as such, the court would interfere herein to protect the right of property’.<sup>198</sup> Furthermore, although the case had its legal basis in property rights, privacy was arguably a fundamental aspect of this case as it involved the intrusion into the plaintiff’s private and domestic life, as well as the misuse of the plaintiff’s private information. This invasion of the plaintiff’s privacy was acknowledged by Sir Knight-Bruce VC where he declared that ‘as the etchings were executed by the plaintiff and his consort for their private use, they were entitled to

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<sup>192</sup> Aplin, T., Bently, L., Johnson, P., and Malynicz, S. *Gurry on Confidence – The Protection of Confidential Information*. Oxford: Oxford University Press, 2012, 50.

<sup>193</sup> *Campbell v Mirror Group Newspapers* [2004] 2 AC 457, para 43.

<sup>194</sup> *Imerman v Tchenguiz* [2011] Fam 116.

<sup>195</sup> Para 55.

<sup>196</sup> Aplin, Bently, Johnson, and Malynicz, *ibid*, 14; see also Wilson A., and Jones, V. Photographs, Privacy and Public Places. *European Intellectual Property Review*. 2007: 29(9), 357 - 361, 360.

<sup>197</sup> *Prince Albert v Strange* [1849] 2 De G & Sm 652, 679.

<sup>198</sup> *Prince Albert v Strange* [1849] 1 Mac & G 25, 44.

retain a state of privacy, to withhold such from publication'.<sup>199</sup> To this end, Sir Knight-Bruce VC declared

I think, therefore, not only that the Defendant here is unlawfully invading the Plaintiff's right, but also that the invasion is of such a kind and affects such property as to entitle the Plaintiff to the preventative remedy of an injunction ... because it is an intrusion – an intrusion ... offensive to that inbred sense of propriety natural to every man – if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life – into the home (a word hitherto sacred among us), the home of a family ... the most marked respect in this country.<sup>200</sup>

On appeal, Lord Cottenham LC in a further acknowledgement of privacy stated that the etchings in question were the exclusive property of the plaintiff, hence

[The plaintiff] is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his<sup>201</sup> [and] in the present case ... privacy is the right invaded.<sup>202</sup>

However, in spite of the fact that privacy was a fundamental aspect in this case, the case was not pursued under an action for an invasion of privacy since privacy as an independent cause of action had not at the time been contemplated in English law. Privacy in this period was deemed a property right, and as such, an interference with one's private information<sup>203</sup> was deemed and dealt with, not as an interference with one's privacy, but as an interference with one's property rights in that information – '*a violation of one's property*'<sup>204</sup> – which, depending on how the violation of property occurred, could bring about an action in breach of confidence, breach of trust, and/or breach of contract. In perceiving privacy as a property right, the idea was that privacy was '*one attribute of property which was often its most valuable quality*'.<sup>205</sup>

### The traditional action for the breach of confidence requirements

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<sup>199</sup> *Prince Albert v Strange* [1849] 2 De G & Sm 652, 698.

<sup>200</sup> At 698.

<sup>201</sup> *Prince Albert v Strange* [1849] 1 Mac & G 25, 46.

<sup>202</sup> At 47.

<sup>203</sup> Such as where a person's private journal fell into the hands of another who sought to publish it without the owner's consent. See Sir Knight-Bruce VC in *Prince Albert v Strange* [1849] 2 De G & Sm 652, 675.

<sup>204</sup> Sir Knight-Bruce VC at 675.

<sup>205</sup> Sir Knight-Bruce VC at 670.

As the law further evolved, it became settled that there are three requirements which are essential for a successful action under the traditional action for breach of confidence to succeed. These requirements were laid down by Megarry J in *Coco v Clark (Engineers) Ltd.*<sup>206</sup> In accordance with Megarry J's declaration, three elements are required if, apart from contract, a case of breach of confidence is to succeed:

First, the information itself in the words of Lord Greene MR in the *Saltman* case ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.<sup>207</sup>

These requirements are briefly examined below.

#### A. Confidential quality of information

Confidential quality entails that the information in question must be confidential in nature. As explained by Lord Greene in *Saltman Engineering Co v Campbell Engineering Co*<sup>208</sup>

[For] information to be confidential, [it] must ... have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.<sup>209</sup>

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<sup>206</sup> *Coco v Clark (Engineers) Ltd* [1968] FSR 415. In this case, the plaintiff designed a moped engine and sought the co-operation of the defendants in its manufacture; in so doing, the plaintiff disclosed all the details of his design and proposals for its manufacture to the defendants. After unsuccessful contract negotiations, the defendants decided to manufacture their own engine with what the plaintiff alleged resembled their design.

An injunction which sought to restrain the defendants from misusing information communicated to them in confidence failed.

<sup>207</sup> At 419.

<sup>208</sup> *Saltman Engineering Co v Campbell Engineering Co* [1947] 65 RPC 203. This case, the drawing tools of the plaintiff were contracted to the defendant for the manufacture of leather punches. After the manufacture, the defendant without the plaintiff's consent converted them for their own commercial use.

The court held that the confidential information supplied to the defendants by the plaintiffs to enable the defendants to manufacture machine tools under a contract between the plaintiffs and the defendants was misused by the defendants by its conversion for their own behalf, without the consent of the plaintiffs; and as such, the plaintiffs were entitled to damages for breach of confidence. Lord Greene MR stated that in the circumstance, an obligation based on confidence existed, and bound the conscience of the defendants.

<sup>209</sup> At 215.

Megarry J reiterated this in his judgment in *Coco v Clark (Engineers) Ltd*<sup>210</sup> adding that

Something which is public property and public knowledge cannot *per se* provide any foundation for proceedings of breach of confidence.<sup>211</sup>

This in essence denoted that there could be no breach of confidence in revealing to others, information that was already common knowledge which was in the public domain, irrespective of the fact that such information was communicated in confidence. As stated by Carty,<sup>212</sup> ‘information which is in the “public domain” is the antithesis of confidential’.

### B. Obligation of confidence

The second requirement towards a successful action for breach of confidence as laid down by Megarry J. in *Coco v Clark (Engineers) Ltd*<sup>213</sup> is that ‘information must have been communicated in circumstances which import an obligation of confidence’.<sup>214</sup> Relying on the case of *Saltman Engineering v Campbell Engineering Co*,<sup>215</sup> Megarry J. noted

I think it is quite plain from the Saltman case that the obligation of confidence may exist where, as in this case, there is no contractual relationship between the parties. In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.<sup>216</sup>

To this end, Megarry J., in indicating that an obligation of confidence may exist by express agreement or implied by law, declared the circumstances in which the obligation will be imposed, thus

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<sup>210</sup> *Coco v Clark (Engineers) Ltd* [1968] FSR 415.

<sup>211</sup> At 419.

<sup>212</sup> Carty, H. An analysis of the modern action for breach of commercial confidence: when is protection merited? *Intellectual Property Quarterly*. 2008: 4, 416-455.

<sup>213</sup> *Coco v Clark (Engineers) Ltd* [1968] FSR 415.

<sup>214</sup> At 420.

<sup>215</sup> *Saltman Engineering Co v Campbell Engineering Co* [1947] 65 RPC 203.

<sup>216</sup> At 419.

If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised upon reasonable grounds that the information was being given to him in confidence.<sup>217</sup>

Consequently, the question of whether there has been a breach of obligation of confidence involves an objective test in which as noted by Megarry J, ‘the hard worked creature – the reasonable man – may be pressed into service, to once more labour in equity’.<sup>218</sup>

It is noted however, that irrespective of how secret and confidential information is, there can be no binding obligation of confidence if that information is communicated in circumstances which negate any duty of holding it confidential, such as where information is divulged in public by the person who expects an obligation to be respected; that is to say, the owner of the information. Equally, if a person owes another an obligation of confidence regarding information, and in breach of this obligation the information finds its way to the public domain, the person who owes the obligation of confidence may be prevented from being able to use the information for a reasonable time thereafter, in spite of the fact that it is in the public domain. This is known as the *spring board* doctrine.<sup>219</sup>

An obligation of confidence may therefore be by express agreement, or implied by law. It may also arise in cases of contract,<sup>220</sup> employee/employer relationship,<sup>221</sup> or in the case of third party recipients.<sup>222</sup>

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<sup>217</sup> At 420-421.

<sup>218</sup> At 420.

<sup>219</sup> See *Terrapin v Builders Supply Co* [1967] RPC 375; *Sun Valley Foods Ltd v John Phillip Vincent* [2000] FSR 825.

<sup>220</sup> *KS Paul (Printing Machinery) Ltd v Southern Instruments Ltd* [1964] RPC 118.

<sup>221</sup> *Faccenda Chicken Ltd v Fowler* [1985] FSR 105. For government employee/employer see *Attorney General v Observer Ltd* [1988] 3 WLR 776; [1990] 1 AC 109.

<sup>222</sup> Generally, where a third party comes about information in circumstances in which an obligation of confidence cannot be imposed, or where he is not aware of its confidential nature, he becomes free in the use of such information. However, as stated by Lord Denning in *Fraser v Evans* [1969] 1 QB 349, where a person innocently comes about information, once he becomes aware that it was originally given in confidence, he can be restrained from breaking that confidence.

Furthermore, an obligation of confidence will be implied where a third party comes in contact with an ‘obviously confidential document’, such as, for instance, “where an obviously confidential document is wafted by an electric fan out of a window ... or ... is dropped in a public place, and is then picked up by a passer-by”. Lord Goff in *Attorney General v Observer Ltd* [1988] 3 WLR 776; [1990] 1 AC 109, 281.

### C. Detriment

The third requirement for an action of breach of confidence according to Megarry J. in *Coco v Clark (Engineers) Ltd*<sup>223</sup> is that

There must be an unauthorised use of that information to the detriment of the party communicating it.<sup>224</sup>

Although detriment is stated by Megarry J. to be a requirement as seen above, it is not clear if detriment is a prerequisite for a successful action in all cases. This is because Megarry J. went on to state that

...although for the purposes of this case I have stated the proposition [that there must be an unauthorised use of that information to the detriment of the party communicating it] in the stricter form, I wish to keep open the possibility of the true proposition being that in the wider form.<sup>225</sup>

Indeed, courts have been reluctant to definitively take a stand on the subject. To this end, Lord Goff in *Attorney General v Guardian Newspapers Ltd*<sup>226</sup> restated that he wished ‘to keep open the question whether detriment was an essential requirement of an action for the breach of confidence’.<sup>227</sup>

### **The nature of protection the traditional action for breach of confidence provides the corporation**

This section analyses the nature of protection the traditional action provides. It investigates whether the traditional action provides protection for the privacy of the corporation – that is to say, protection against the misuse of the corporation’s private information as well as the protection of the corporation’s intrusion interest – and

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<sup>223</sup> *Coco v Clark (Engineers) Ltd* [1968] FSR 415.

<sup>224</sup> At 421.

<sup>225</sup> At 421.

<sup>226</sup> *Attorney General v Observer Ltd* [1988] 3 WLR 776; [1990] 1 AC 109.

<sup>227</sup> At 281.

For a further examination of the three requirements of the traditional action, see generally, Aplin, T., Bently, L., Johnson, P., and Malynicz, S. *Gurry on Confidence – The Protection of Confidential Information*. Oxford: Oxford University Press, 2012. See also *Coco v Clark (Engineers) Ltd* [1968] FSR 415. Arnold, R. Circumstances Importing an Obligation of Confidence. *Law Quarterly Review*. 2003: 119, 193-199.

argues that the traditional action only protects against the misuse of commercial confidential information.

*Protection against the misuse of commercial confidential information*

Although the traditional action for breach of confidence arguably had its origin in the protection of the two fundamental interests of intrusion and information privacy, albeit in a commercial context, as illustrated from the case of *Prince Albert v Strange*<sup>228</sup> above, as the law developed, the majority of cases handled thereunder were predominantly cases involving the protection of commercial confidential information of the individual as well as the corporation.<sup>229</sup> However, a few cases involving the protection of the private information of individuals were instituted on the grounds of breach of confidence;<sup>230</sup> but this was the position before the Human Rights Act 1998 [HRA]. With the implementation of the HRA, which gave effect to the rights and freedoms under the European Convention of Human Rights 1950 [ECHR], the protection of privacy has developed into an independent cause of action. As such, cases involving the violation of privacy of the individual began to be handled by a mechanism which involved the incorporation of Articles 8 and 10 ECHR into the traditional action to establish a new action that has become known as *the extended action for the breach of confidence*.<sup>231</sup> With the protection of the privacy of the individual as an independent cause of action under the extended action for breach of confidence, the traditional action presently and adequately protects against the misuse of commercial confidential information of both individuals and corporations, as further illustrated in such matters as relating to manufacturing technology,<sup>232</sup> technical

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<sup>228</sup> *Prince Albert v Strange* [1849] 2 De G & Sm 652; 1 Mac & G 25.

<sup>229</sup> Some notable cases include *Saltman Engineering Co v Campbell Engineering Co Ltd* [1947] 65 RPC 203; *Morison v Moat* [1851] 9 Hare 241; *Peter Pan v Corsets Silhouette* [1963] RPC 45; *Seager v Copydex* [1967] 2 All ER 415; *Coco v Clark (Engineers) Ltd* [1968] FSR 415; *Fraser v Evans* [1969] 1 QB 349; *Faccenda Chicken Ltd v Fowler* [1985] FSR 105; [1987] Ch 117; *Lansing Linde v Kerr* [1991] 1 WLR 251.

<sup>230</sup> See, for instance, *Duchess of Argyll v Duke of Argyll* [1967] Ch 302 [in this case, an injunction was sought to restrain the first defendant from publishing information relating to plaintiff's private life, personal affairs or private conduct communicated to the first defendant in confidence during the subsistence of their marriage]; *Woodward v Hutchins* [1977] 1 WLR 760 [an injunction was sought to prevent further publication of plaintiff's private life, including adulterous conduct]; *Lennon v News Group Newspapers* [1978] FSR 573 [an injunction was sought to restrain the publication of details of plaintiff's married life].

<sup>231</sup> This is analysed in detail in chapter 3.

<sup>232</sup> See *Collag Corp v Merck & Co Inc* [2003] FSR 16; *Coco v Clark (Engineers) Ltd* [1968] FSR 415.



secrets,<sup>233</sup> financial secrets,<sup>234</sup> customer information,<sup>235</sup> as well as the springboard doctrine.<sup>236</sup>

Consequently, one may thus ask: what is commercial confidential information?

Commercial confidential information may be defined as information of a confidential nature which is related to business or trading activity, through which a business may achieve economic advantage over other competing businesses. It is also referred to as trade secrets. In *Faccenda Chicken Ltd v Fowler*,<sup>237</sup> in which the plaintiffs filed an injunction and made claim to damages for breaches of contracts of employment and/or breaches of confidence, for the use of confidential information or trade secrets gained by the defendants in the course of their employment; Goulding J., in the course of his judgment,<sup>238</sup> identified two classes of commercial confidential information as follows

[First] information which the employee must treat as confidential (either because he is expressly told it is so or because from its character it is obviously confidential) but which once learned necessarily remained in the employee's head and became part of his own skill and knowledge applied in the course of his employer's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master.

[Secondly] specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the employee may have left the service, cannot lawfully be used save for the employer's benefit.<sup>239</sup>

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<sup>233</sup> Such as product drawing for machines. See *Nichrotherm Electrical Co Ltd v Percy* [1957] RPC 207.

<sup>234</sup> Such as unpublished company accounts. See *X Ltd v Morgan Grampian Publishers Ltd* [1991] 1 AC 1.

<sup>235</sup> Such as card index system, or the goods they buy. See *Roger Bullivant Ltd v Ellis* [1987] FSR 172; *Lansing Linde v Kerr* [1991] 1 WLR 251, respectively; see also *Fraser v Evans* [1969] 1 QB 349.

<sup>236</sup> *Terrapin v Builders Supply Co* [1967] RPC 375; See also *Sun Valley Foods Ltd v John Phillip Vincent* [2000] FSR 825.

<sup>237</sup> *Faccenda Chicken Ltd v Fowler* [1985] FSR 105; [1987] Ch 117.

<sup>238</sup> In which he held that the information in question was confidential information which the defendants could not use or disclose during their employment without breaching their duty of fidelity to their employer, but which, in the absence of an express restrictive covenant, they was at liberty to use and disclose, in competition with the plaintiffs, once they had left the plaintiffs employment.

<sup>239</sup> At 106. See also *Lansing Linde v Kerr* [1991] 1 WLR 251, 259.

On appeal, the Court of Appeal, disagreed with the first class of commercial confidential information as espoused by Goulding J., where Goulding J. suggested that an employer can protect the use of information even though it does not include either a trade secret or its equivalent, by means of a restrictive covenant. The Court of Appeal stated that ‘a restrictive covenant will not be enforced unless the protection sought is reasonably necessary to protect a trade secret or to prevent some personal influence over customers being abused so as to entice them away’.<sup>240</sup> The Court of Appeal however upheld the second class of commercial confidential information as specific trade secrets so confidential that it cannot lawfully be used for the employee’s benefit even where the employee may have left service. Lord Neill LJ went on to define trade secrets as commercial information which is ‘of a sufficiently high degree of confidentiality’.<sup>241</sup>

In clarifying the notion of trade secrets, Staughton LJ in *Lansing Linde v Kerr*,<sup>242</sup> declared that trade secrets may be defined thus

[Frist] it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication...<sup>243</sup>

In the earlier case of *Thomas Marshall (Exports) Ltd. v Guinle*,<sup>244</sup> Megarry V-C had declared that four elements may be discerned in identifying confidential information or trade secrets which the court will protect, thus

First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e., that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be

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<sup>240</sup> At 137. See also *Morris Ltd v Saxelby* [1916] 1 AC 688, 709.

<sup>241</sup> *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, 136.

The Court of Appeal therefore dismissed the appeal holding that the employees were at liberty to use and disclose the information once they had left the plaintiffs' employment.

<sup>242</sup> *Lansing Linde v Kerr* [1991] 1 WLR 251.

<sup>243</sup> At 260.

<sup>244</sup> *Thomas Marshall (Exports) Ltd. v Guinle* [1979] Ch. 227.

reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned.<sup>245</sup>

From these definitions, it becomes clear that commercial confidential information – trade secrets – has three elements:

- a. Information must be confidential
- b. Information has commercial value
- c. Reasonable efforts must have been made by the holder to maintain its confidentiality.<sup>246</sup>

It is suggested that trade secrets are broadly divided into two classes: technical secrets, and business secrets.<sup>247</sup> Technical secrets are secrets which relate to the production of goods and services<sup>248</sup> and have been held under the traditional action for breach of confidence to include such processes as secret processes of manufacture such as chemical formulae,<sup>249</sup> special methods of construction,<sup>250</sup> secret recipes,<sup>251</sup> designs and drawings.<sup>252</sup> Business secrets are secrets which the business entity generates about its business activities<sup>253</sup> and have been held under the traditional action for breach of confidence to include copies of list of customers of employer and the goods which they buy,<sup>254</sup> the names and telex addresses of an employer's manufacturers, suppliers and overseas buying agents through whom the company deals,<sup>255</sup> the company's samples, new ranges and current "fast-moving" lines,<sup>256</sup> quotations,<sup>257</sup> costs<sup>258</sup> and prices,<sup>259</sup> the

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<sup>245</sup> At 248.

<sup>246</sup> This follows the definition of trade secrets in the 'European Commission's Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure', para 5.1, 28/11/2013 @ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0813:FIN:EN:PDF> Accessed on 14/02/2014; see also Section 39(2) TRIPS Agreement; Aplin, T., Bently, L., Johnson, P., and Malynicz, S. *Gurry on Confidence – The Protection of Confidential Information*. Oxford: Oxford University Press, 2012, at 176.

<sup>247</sup> Aplin, Bently, Johnson, and Malynicz, *ibid*.

<sup>248</sup> *Ibid*.

<sup>249</sup> *Faccenda Chicken Ltd v Fowler* [1987] Ch 117; see also *Amber Size & Chemical Co Ltd v Menzel* [1913] 2 Ch 239.

<sup>250</sup> *Reid & Sigrist Ltd v Moss and Mechanism Ltd* [1932] 49 RPC 461.

<sup>251</sup> *Morison v Moat* [1851] 9 Hare 241.

<sup>252</sup> *Inline Logistics Ltd v UCI Logistics Ltd* [2002] RPC 32.

<sup>253</sup> Aplin, Bently, Johnson, and Malynicz, *ibid*.

<sup>254</sup> *Lansing Linde v Kerr* [1991] 1 WLR 251.

<sup>255</sup> *Thomas Marshall (Exports) Ltd. v Guinle* [1979] Ch 227.

<sup>256</sup> *Thomas Marshall (Exports) Ltd. v Guinle* [1979] Ch 227, 249.

<sup>257</sup> *PSM International Plc v Whitehouse & Willenhall Automation Ltd* [1992] FSR 489.

<sup>258</sup> *Thomas Marshall (Exports) Ltd. v Guinle* [1979] Ch 227.

scope of business secrets also extend to information about the management and performance of a business, and plans for its future.<sup>260</sup>

From the above, therefore, it has been demonstrated that the traditional action for the breach of confidence is a medium which fully protects against the misuse of commercial confidential information – trade secrets. Furthermore, following from the above account of trade secrets as including the secret processes of manufacture such as chemical formulae, special methods of construction, secret recipes, designs and drawings, copies of list of customers of employer and the goods which they buy, the names and telex addresses of an employer's manufacturers, suppliers, and overseas buying agents through whom the company deals, the company's samples, new ranges, and current *fast-moving* lines, quotations, costs and prices, information about the management and performance of a business, and plans for its future; it is observed that the corporation's privacy has not been included in its protection.<sup>261</sup>

Accordingly, it then follows to inquire: does the traditional action for breach of confidence provide protection for the corporation's information privacy interest?<sup>262</sup> Equally, does the traditional action provide protection for the corporation's intrusion privacy interest?<sup>263</sup> That is to say, does the traditional action provide protection for the privacy of the corporation? This is investigated below.

#### *Protection for the privacy of the corporation?*

Having found that the traditional action for breach of confidence protects against the misuse of commercial confidential information, the investigation is made into whether the traditional action also protects the corporation's privacy.

It is argued that in cases dealt with under the traditional action for the breach of confidence which involve the misuse of commercial confidential information of the corporation, the misuse of its private information as well as intrusion into its property,

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<sup>259</sup> Ibid. See also *Morris Ltd v Saxelby* [1916] 1 AC 688.

<sup>260</sup> *Phillips v News Group Newspapers Ltd* [2013] 1 AC 1.

<sup>261</sup> The privacy of the corporation is espoused in part 3 of chapter 1.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

the commercial aspect of the case tends to be dealt with under the traditional action, and the privacy aspect arguably not recognized. This is illustrated in the case of *Schering Chemicals v Falkman Ltd.*<sup>264</sup> In this case, the plaintiff company employed a firm which held a training course with the aim of countering the adverse publicity the plaintiff company was facing regarding one of its drugs. In the course of this training, the plaintiff company supplied information which the firm agreed to keep confidential. Subsequently, one of the instructors of the firm, Mr Elstein, without the consent of the plaintiff, and in collaboration with a production company, Thames, made a film concerning the drug. Furthermore, Sunday Times got hold of a file of the internal correspondence of the plaintiff company and published it.

In the court of first instance, the court granted an injunction restraining the instructor, Mr Elstein, and the production company, Thames, from broadcasting the film on the grounds of breach of confidence.

On appeal, the order of the lower court was upheld.<sup>265</sup>

The court adjudicated the case on the basis of breach of confidence in a commercial context. Shaw LJ indicated that the commercial interests of the party confiding the information was the interest involved. In arriving at its judgment, the court indicated that Mr Elstein and Thames owed the plaintiff an obligation of confidence for the confidential information which was used without the plaintiff's consent.

On the commercial context, Shaw LJ noted that Schering was owed an obligation of confidence by Mr Elstein. He noted that save for certain information which may be in the public interest or public safety to conceal, an obligation of confidence was one which the receiver of information was obliged to keep. To this end, he stated

As I see the position, the communication in a commercial context of information which at the time is regarded by the giver and recognised by the recipient as confidential, and the nature of which has a material connection with the commercial interests of the party confiding that information, imposes

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<sup>264</sup> *Schering Chemicals v Falkman Ltd* [1982] QB 1.

<sup>265</sup> By Lord Shaw LJ, and Lord Templeman LJ. Lord Denning MR dissenting.

on the recipient a fiduciary obligation to maintain that confidence thereafter unless the giver consents to relax it.<sup>266</sup>

On the obligation of confidence, Templeman LJ added that Mr Elstein had an implied obligation of confidence to Schering on the basis that the information in question was Schering's information which he acquired as a result of his training. Templeman LJ stated

In any event, even if Mr Elstein did not make an express promise himself to Schering and did not know that Falkman had made an express promise to Schering on his behalf that he would not make use in the future of information public or private supplied by Schering for the purposes of the training programme, he nevertheless, in my judgment, impliedly made such a promise to Schering when he agreed to take part in the training programme, accepted information supplied by Schering for that purpose...<sup>267</sup>

His Lordship noted that the fact that Mr Elstein was not employed and paid by Schering but by Falkman does not prevent the implication of such a promise as it was obvious to him that the information supplied by Schering was specifically given to him for one purpose only, which is, to enable him to advise Schering how to avoid or mitigate bad publicity in the future.<sup>268</sup>

Furthermore, his Lordship stated that the production company that chose to employ Mr Elstein in making a film with full knowledge of all the circumstances were in no better position than Mr Elstein himself. His Lordship noted that

The confidentiality which attaches to Mr Elstein attaches likewise to Thames Television.<sup>269</sup>

Consequently, the appeal by Mr Elstein and Thames to lift the injunction restraining them from broadcasting the film on the grounds of breach of confidence was dismissed.<sup>270</sup> This position accords with the *spring board* doctrine,<sup>271</sup> wherein a person

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<sup>266</sup> Page 27.

<sup>267</sup> Page 36.

<sup>268</sup> Ibid.

<sup>269</sup> Page 38.

<sup>270</sup> With Lord Denning dissenting on the grounds of freedom of expression. See below.

<sup>271</sup> Discussed under the 'obligation of confidence' section above.

who owes another an obligation of confidence may be prevented from being able to use information upon which the said obligation is based, for a reasonable time, even though the information in question may already be in the public domain.

It is, however, suggested that there are privacy aspects to this case which were not accorded protection. The publication of the contents of the file of the internal correspondence of Schering by Sunday Times, without Schering's consent, amounted to an interference with Schering's private information – thereby engaging Schering's information privacy interest. Likewise, the taking of the file of the internal correspondence by Sunday Times, without Schering's consent, amounted to an intrusion into Schering's correspondence – thereby engaging the intrusion privacy interest.

That a corporation may have correspondence which may be justifiably regarded as private was recognised by the Court of Appeal in *R v Broadcasting Standards Commission ex parte BBC*,<sup>272</sup> in which Lord Woolf MR declared that 'a corporation has correspondence which could be justifiably regarded as private';<sup>273</sup> adding that the dissemination of the contents of such correspondence 'would amount to interference with the corporation's privacy'.<sup>274</sup>

The privacy aspect of this case regarding the file of the internal correspondence of Schering, which had been taken and published by Sunday Times without Schering's consent, was not recognised as an interference with Schering's privacy, or even considered by the majority,<sup>275</sup> who focused on the commercial aspect only. However, Lord Denning MR, dissenting, recognised this privacy aspect of the case, and deemed it 'a breach of confidence, or, in the alternative, an infringement of copyright'.<sup>276</sup> Lord Denning MR further recognized that some other private information of Schering, the corporation, was also involved, which it handed to the training firm. To this end, Lord Denning MR stated

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<sup>272</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885. This case which dealt specifically with broadcasting is discussed in the last part of this chapter.

<sup>273</sup> Para 33; see also Hale LJ, para 42.

<sup>274</sup> *Ibid.*

<sup>275</sup> Lord Shaw and Lord Templeman.

<sup>276</sup> *Schering Chemicals v Falkman Ltd* [1982] QB 1, 9.

It is important to remember that this is an interlocutory application in which it is not possible to know the full facts. Suffice it to say ... neither Mr Elstein nor Thames were at liberty to use any *private* information without the consent of Schering...<sup>277</sup>

Lord Denning MR, dissenting, subsequently, decided the case on the basis of balancing the interests of freedom of expression under Article 10 ECHR and privacy under Article 8 ECHR, and incorporating both into the action of breach of confidence. In considering whether there had been a breach of duty of confidence Lord Denning MR therefore declared

Whilst freedom of expression is a fundamental human right, so also is the right to privacy. Everyone has the right to respect for his private life and his correspondence: article 8 of the European Convention. This includes a right to have his confidential information kept confidential. This right may in some circumstances be so important that it takes priority over the freedom of the press. An injunction may be granted restraining the newspapers from breaking the confidence. The principle is well expressed in article 10 (2) of the European Convention. It recognises that the freedom of expression may be restricted whenever a restriction is "necessary in a democratic society, for preventing the disclosure of information received in confidence..." If Thames were about to publish important private information which was highly confidential and very properly confined to Schering, I have no doubt that an injunction should be granted to prevent its publication in the film.<sup>278</sup>

On the basis of balancing the two competing interests of freedom of expression and privacy, Lord Denning MR ruled in favour of freedom of expression, declaring

I am clearly of opinion that no injunction ought to be granted to prevent the publication of this information, even though it did originate in confidence. It dealt with a matter of great public interest. It contained information of which

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<sup>277</sup> Ibid, 15.

<sup>278</sup> At 21-22.



the public had a right to know. It should not be made the subject of an injunction.<sup>279</sup>

On this balancing act, Lord Denning MR declared

Freedom of the press is of fundamental importance in our society... It is not to be restricted on the ground of breach of confidence unless there is a pressing social need for such restraint. In order to warrant a restraint, there must be a social need for protecting the confidence sufficiently pressing to outweigh the public interest in freedom of the press. But there are other cases when the right of the press to inform the public – and the corresponding right of the public to be properly informed – takes priority over the right of privacy: see paragraphs 65-66 of the judgment of the European Court of Human Rights in *The Sunday Times case*[1979] 2 E.H.R.R. 245 , 280-281. In such a case no injunction should be granted against the newspapers and television to prevent them from publishing the information, even though it originated in confidence.<sup>280</sup>

Lord Denning MR ruled in favour of freedom of expression, on the grounds that the present case was one in which the right of the press to inform the public, as well as the right of the public to be properly informed took priority over the corresponding right of privacy. Although Lord Denning MR ruled in favour of freedom of expression, Lord Denning dealt with and decided *Schering's* case on the basis of *privacy v freedom of expression*. It is suggested that Lord Denning MR in stating that *a right to privacy where everyone had the right to respect for his private life and his correspondence in accordance with Article 8 ECHR includes a right to have his confidential information kept confidential*, in the light of his statement that *neither Mr Elstein nor Thames were at liberty to use any "private" information without the consent of Schering*;<sup>281</sup> Lord Denning MR was speaking to the right of Schering to have its privacy protected under Article 8 ECHR. Equally, Lord Denning in stating that *if Thames were about to publish important private information which was highly confidential and very properly confined to Schering*; it is also suggested that Lord Denning MR was referring to Schering's right to its privacy under Article 8 ECHR.

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<sup>279</sup> At 22.

<sup>280</sup> At 22.

<sup>281</sup> At 15.

In addition, a transmutation of information from commercial confidential information to private information is observed in Lord Denning's adjudication. This transmutation accords with the classification of the corporation's private information in chapter 1;<sup>282</sup> it also accords with the principles enunciated in cases such as *Societe Colas Est v France*,<sup>283</sup> and *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC*,<sup>284</sup> which suggests that Article 8 ECHR may be a home for the issue of the legitimacy of access to and interference with private information of, *inter alia*, corporations.

Consequently, it is submitted that in adjudicating the *Schering's* case, Lord Denning's judgment, although dissenting, envisaged a corporation having a right to privacy, and recognised the corporation's privacy through the counter-balance between privacy and freedom of expression. In balancing the two competing interests, Lord Denning MR incorporated the Article 8 ECHR rights (of the privacy of the corporation) and the Article 10 ECHR rights (of the freedom of expression of the press) into the traditional action for breach of confidence, and decided the case on that basis.<sup>285</sup>

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<sup>282</sup> Articulated in part 3, under *information privacy interest*.

<sup>283</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>284</sup> *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC* [2010] EWHC Civ 1214.

<sup>285</sup> As noted above, this case was handled as a purely commercial case by the majority. It has also been questioned whether there is, in addition, a fiduciary duty aspect to this case. Aplin, T., Bently, L., Johnson, P., and Malynicz, S. *Gurry on Confidence – The Protection of Confidential Information*. Oxford: Oxford University Press, 2012, chapter 9, 409 - 415.

Professor Aplin *et al* states that it has been debated whether the obligation of confidence carries with it a fiduciary duty; or whether there is a distinction between the concepts of confidence and fiduciary duty.

For the view that the breach of confidence can be assimilated into fiduciary duty, see generally, Klinck, D.R. "Things of Confidence": Loyalty, Secrecy and Fiduciary Obligation. 54 *Saskatchewan Law Review*. 1990, 73-99. Klinck takes the view that fiduciary obligation emphasizes the obligation of the fiduciary which arises because the fiduciary has something which belongs to another person, for instance property. He further states that it is appropriate to fix the fiduciary with an obligation to hold that something for the other, and in so doing, to exact loyalty. Klinck continues that in the case of imparting confidential information, the confidence involved is that the information will be used only for a limited purpose; in addition, the obligation corresponding to this confidence is described in terms of secrecy, which is virtually a synonym for confidentiality - Therefore if fiduciary obligation is essentially defined by loyalty, then the obligation of secrecy involved in imparting confidential information is difficult to distinguish from it. To this end, Klinck thus concluded that the breach of confidence can be assimilated into the fiduciary principle; and that a breach of the obligation of secrecy will entail a breach of the obligation to remain true to the interests defined by the confidence – that is to say, a breach of loyalty. At page 92-94.

Conversely, for the view that a breach of confidence is not, and should not to be limited to the spectrum of fiduciary duty, see generally, Hammond, R.G. Is Breach of Confidence Properly Analysed in Fiduciary Terms? *McGill Law Journal*. 1979-80, 25, 244-253. Hammond notes that the notion that the equitable obligation of confidence is doctrinally dependent upon the spectrum of fiduciary obligation seemed to have gained acceptance. He however rejected the necessity to link the equitable duty of

As has been demonstrated from the above case, under the traditional action for breach of confidence, only the commercial confidential information of the corporation<sup>286</sup> is protected. The corporation's privacy – the intrusion privacy interest and the information privacy interest – is not provided protection under the traditional action for breach of confidence. Lord Denning's approach of recognising the privacy of the corporation through a counter-balance of *privacy v freedom of expression* under the traditional action in his dissenting judgment is *sui generis* in its application. In other cases adjudicated under the traditional action for breach of confidence, the concept of the recognition of the corporation's private information interest as well as its intrusion interests are generally deemed a concept which cannot apply to corporations; hence these privacy concerns under the traditional action are either left untreated with the focus on the commercial confidential information aspects of the case,<sup>287</sup> or such privacy concerns are transferred to represent the privacy concerns of the individual alone.

The reluctance to entertain the abovementioned privacy concerns of the corporation on its own merit, but rather the transferring of such privacy concerns to represent the privacy of the individual inhabitants of a corporation alone, is illustrated in the case of *Lakeside Homes Ltd v BBC*.<sup>288</sup> In this case, the claimant, Lakeside Homes, applied to the court for an injunction to restrain the BBC from broadcasting a film made by its agent who had worked undercover as a staff member at a nursing home, relating to the

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confidence with the spectrum of fiduciary duties. He takes the view that to circumscribe the equitable duty of confidence by restricting its application to those situations governed by the law relating to fiduciary obligations, would be to seriously stunt or even terminate the growth of the doctrine of breach of confidence. At page 250 and 251.

On whether breach of confidence can be linked to a breach of fiduciary duty, Professor Aplin *et al* observed that Shaw LJ in Schering's case appeared to characterise the duty imposed on Mr Elstein in respect of confidential information that he had been given by *Schering*, as a fiduciary duty [Per Shaw LJ at page 12 above]; and takes the view that although confidentiality and fiduciary obligations are conceptually distinct, both may also be overlapping or intertwined, and arguments in favour of the view that an obligation confidence carries with it a fiduciary duty are more persuasive, in addition to the weight of judicial authority on the issue. As such, although confidence is not fiduciary, it can be linked to such a duty.

<sup>286</sup> As well as the individual's.

<sup>287</sup> As illustrated by the majority decision in *Schering's* case.

<sup>288</sup> *Lakeside Homes Ltd v BBC* [2000] WL 1841602.

standards of care at the home. The claim was based, *inter alia*, on alleged breach of confidence. The application for an injunction failed.

This case was argued on the basis that the BBC's agent owed a duty of confidentiality to the claimant and also separately to its residents, and as such, the disclosure by the BBC's agent was a breach of her confidentiality to the corporation, as well as to the residents. The agent's disclosure was also argued to be an unwarranted and completely unjustified invasion into the privacy of the residents' home and residents' private lives in the filming of the residents. The privacy interests of the corporation which involved the intrusion into the corporation's property, and the surreptitious filming of the private activities occurring within its premises with a view to broadcasting the contents were not recognised in this case. Indeed, the individual residents in this case had a right to have their privacy protected; but also, so did the corporation.

Consequently, it is therefore submitted that the surreptitious spying within the property or premises of the corporation, as well as the clandestine filming of the private information of the corporation with the view of dissemination, violated the intrusion interest of the corporation's privacy. The intrusion into the corporation's property or premises, as well as the corporation's private information which were collected are valuable aspects of the intrusion privacy interests of the corporation which were not recognised, and are worthy of protection in English law.

The reluctance to entertain the privacy of the corporation on its own merit, but rather transfer of such privacy concerns to represent the privacy of the individual inhabitants of a corporation alone, is also illustrated in the case of *BKM Ltd v BBC*.<sup>289</sup> In this case, BKM Ltd, a corporation which operated a nursing home, brought an application seeking an injunction to restrain the BBC from broadcasting a programme which was based on surreptitiously obtained material. This injunction was sought, not in pursuit of any rights of its own as a corporation, but in order to protect the rights of the home's residents to their private and family life under Article 8 ECHR.

The BBC however relied on its rights to freedom of expression under Article 10 ECHR, stating that to the extent that there was an infringement of privacy rights, its

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<sup>289</sup> *BKM Ltd v BBC* [2009] EWHC 3151.

Article 10 rights were stronger as it was in the public interest to allow a broadcast that informed on the failure of regulation and standards in the nursing home; besides, the residents faces would not be identified, and voice recording would be modified to disguise the identity of the speaker. Furthermore, that an injunction could not be granted at trial stage, in accordance with the provision of section 12(3) Human Rights Act 1998.<sup>290</sup>

Mann J. in his judgment engaged in a balancing act between the Article 8 ECHR rights of the invasion of privacy and the dignity of the residents by the clandestine filming, and Article 10 ECHR freedom of expression of the BBC based on the public interest, and held in favour of Article 10. Mann J. held in favour of Article 10 on the grounds that the general areas of standards in care homes and the ability of a regulator to maintain them were serious factors which were firmly in the territory of the public interest which outweighed the privacy of the residents; in addition to the weight of section 12(3) and (4). Thus, the injunction was refused.

In this case, it is observed that in the application for the injunction by the claimant corporation, in addition to, *inter alia*, praying the court to restrain the defendant from broadcasting any audio or video of any of the residents, it also prayed the court to restrain from broadcasting

[A]ny part of the bedrooms, toilets, bathrooms and/or lounges including the entrances thereto within the Glyndwr Nursing Home (the Surreptitious Film).<sup>291</sup>

It is contended that in making the plea for the privacy of empty bathrooms or toilets being ‘private’ areas of the said corporation, the claimant was actually speaking to the privacy of the corporation itself – to a possible reasonable expectation of its privacy. As pondered by Mann J. regarding the application for relief based on the privacy of the individual

It was not clear to me why film of empty bathrooms or toilets was an infringement of privacy rights.<sup>292</sup>

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<sup>290</sup> Section 12(1) provides: This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression; and section 12(3) provides: No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

<sup>291</sup> Para 8.

Mann J. goes on to elaborate by reiterating<sup>293</sup>

I have already pointed out that BKM does not rely on any of its own rights in relation to this application. It seems to rely on the rights of its residents.<sup>294</sup>

The combined effect of both statements seem to point to the fact that the infringement of privacy complained of with respect to the filming of the empty spaces, was invariably directed at the corporation's protection. Perhaps BKM was particularly unwilling to pursue this case as a corporate privacy case based on the reluctance the Court of Appeal demonstrated in the case of *R v Broadcasting Standards Commission ex parte BBC*<sup>295</sup> in the course of its judgment;<sup>296</sup> and the position the English law in general, with regard to the corporation's privacy.

As has been demonstrated from the cases above, the traditional action for the breach of confidence is a medium which presently exclusively protects against the misuse of commercial confidential information – trade secrets. It does not provide protection for the private information of the corporation; it also does not provide protection for the intrusion into the corporation's premises or property. Equally, it is observed that where the privacy concerns of the corporation as well as the privacy concerns of the individuals within a corporation are involved, only the privacy concerns of the individuals are accorded protection; while the corporation's interests tend to be subsumed into the individual's interest, or not treated at all. To this end, the protection against the misuse of the corporation's private information and intrusion into its premises or property – the privacy of the corporation – is not accorded protection under the traditional action for breach of confidence.

As declared by Lord Woolf in *R v Broadcasting Standards Commission ex parte BBC*<sup>297</sup> 'in difficult cases, it is perfectly appropriate to have regard to the jurisprudence

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<sup>292</sup> Para 9

<sup>293</sup> Mann J. had emphasized this out initially in para 7.

<sup>294</sup> Para 12.

<sup>295</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

<sup>296</sup> This is illustrated in the last part of this chapter.

<sup>297</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885, para 17.

of the ECtHR, the ECJ, and of other countries'. Accordingly, the reluctance to recognise the privacy of the corporation at common law is seen in another common law jurisdiction – Australia. In the case of *Australia Broadcasting Corporation v Lenah Game Meat Property Ltd (ABC)*<sup>298</sup> in which an application for an interlocutory injunction was brought by Lenah against the ABC, to restrain the broadcasting of a film of its operations at a brush tail possum processing facility, which was made surreptitiously.

The interlocutory application was denied by Underwood J. at the Supreme Court of Tasmania. On appeal to the Supreme Court of Victoria however, the injunction was allowed.<sup>299</sup> ABC subsequently brought the matter before the High Court of Australia in order to have the injunction lifted. The appeal was allowed.<sup>300</sup>

On the invitation by the respondent to the High Court of Australia to declare that Australian law recognises the tort of invasion of privacy, and that it was available to be relied upon by corporations, the court declined to so hold.<sup>301</sup> Gleeson CJ acknowledged that activities such as directors meeting were activities which were private in nature. Similarly, Gleeson CJ accepted that certain internal communications of a corporation may be considered private. Gleeson CJ however drew a pertinent distinction between Australian law and United Kingdom law, stating that the United Kingdom legislation envisaged the possibility of privacy for corporations by virtue of the Broadcasting Act 1996, thus

United Kingdom legislation recognises the possibility. Some forms of corporate activity are private. For example, neither members of the public, nor even shareholders, are ordinarily entitled to attend directors' meetings. And, as at present advised, I see no reason why some internal corporate

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<sup>298</sup> *Australia Broadcasting Corporation v Lenah Game Meat Property Ltd* [2001] HCA 63.

<sup>299</sup> Slicer J. dissenting.

<sup>300</sup> Callinan J. dissenting.

<sup>301</sup> It is noted that the Australian Law Reform Commission has recently recommended in its report: *Australian Law Reform Commission Report on Serious Invasions of Privacy in the Digital Era*, 2014, that a new tort for privacy should only be actionable by natural persons. See @ <http://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123> Accessed on 23/09/2014.

communications are any less private than those of a partnership or an individual.<sup>302</sup>

Gleeson CJ added

However, the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity. This may be incongruous when applied to a corporation.<sup>303</sup>

In looking at Gleeson CJ statements above, it is suggested that the judge acknowledged that a corporation may have the privacy interest of intrusion – into directors meetings, as well as into the internal correspondence of a corporation. Conversely, on his statement that human dignity is the foundation of what is protected in privacy; it is suggested, as illustrated in the definition of privacy for corporations in chapter 1, that the dignity rationale of privacy is but one aspect of the rationales of privacy. There still remains the rationale of autonomy: the autonomy the corporation as a legal personality exercises in limiting unwanted intrusion into its property, which is its home; as well as the autonomy it exercises in deciding whether to, when to, or when not to disclose information about itself – hence the limiting of unwanted dissemination of private information of the corporation. It will be recalled that the case of the sole rationale was also illustrated in the tort of defamation, as discussed in chapter 1, where the three rationales which may explain the concept of reputation under defamation are identified as interests in dignity, honour, and property.<sup>304</sup> It will be recalled that it is established that in the case of a claim of defamation by the individual, the rationales of dignity, honour, and/or property may apply; however, in the case of a claim of defamation by the corporation, it is only the property rationale that applies. This was held not to exclude the corporation from being able to make a claim under defamation. Akin to the property rationale in corporate defamation cases, it is suggested that a sole rationale – the autonomy rationale – supports the corporation's claim under privacy, and this ought not to result in the corporation not being able to claim for the protection against violations of its privacy.

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<sup>302</sup> Para 43.

<sup>303</sup> Para 43.

<sup>304</sup> See Post, *ibid*; Oster, J. The Criticism of Trading Corporations and their Right to Sue for Defamation. *Journal of European Tort Law*. 2011: 2(3), 255-279, 259.



On the position that corporations cannot enjoy a right to privacy in this case, Gummow and Hayne JJ in their joint judgment stated that commercial enterprises may sustain economic harm through methods of competition which are said to be unfair, or by reason of other injurious acts or omissions of third parties.<sup>305</sup> They stated that in the present case, the interest involved concerned the profitable conduct of Lenah's business; and that this provided an important distinction between the interest the corporation may have, and that of the individual in which the individual may be subjected to unwanted intrusion into his personal life and seeks to protect seclusion from surveillance and to prevent communications therefrom. To this end, Gummow and Hayne JJ therefore declared that privacy was not a right that could be enjoyed by corporations.<sup>306</sup>

In noting that a corporation could only suffer economic harm, Gummow and Hayne JJ referred to the observation of Professor W. L. Morison in his 1973 writing<sup>307</sup> with reference to the case of *Victoria Park Racing and Recreation Grounds Co. v Taylor*<sup>308</sup>

The plaintiff in the case was a racecourse proprietor [which] was not seeking privacy for [its] race meetings as such, [it] was seeking a protection which would enable [it] to sell the rights to a particular kind of publicity. [Its] sensitivity was 'pocket book' sensitivity ... The independent questions of the rights of a plaintiff who is genuinely seeking seclusion from surveillance and communication of what surveillance reveals, it may be argued, should be regarded as open to review in future cases even by courts bound by the High Court decision.<sup>309</sup>

It is however noted that Morison in the above quotation distinguished between the commercial aspect of a corporation's information and its privacy. He noted that the plaintiff, racecourse proprietor, was not seeking privacy for its race meetings – a statement which suggests the possibility of privacy for corporations; but that it, the plaintiff, was seeking to protect its commercial interest in its publicity – hence the commercial aspect. He went on to state that ascertaining the rights a plaintiff who genuinely sought seclusion from surveillance and communication of what surveillance

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<sup>305</sup> Para 80.

<sup>306</sup> Para 84.

<sup>307</sup> *Parliamentary Report on the Law of Privacy*, Paper No 170, New South Wales, 1973, par 12.

<sup>308</sup> *Victoria Park Racing and Recreation Grounds Co. v Taylor* [1937] HCA 45.

<sup>309</sup> Para 108.

reveals, was an independent question which, arguably, ought to be regarded as open to review in future cases.

In stating that *the questions of the rights of a plaintiff who is genuinely seeking seclusion from surveillance and communication of what surveillance reveals, it may be argued, should be regarded as open to review in future cases*, it is suggested that Professor Morison adopted an approach in which he envisaged the future possibility of privacy for corporations in the form of a plaintiff who genuinely sought seclusion from surveillance and communication of what surveillance reveals. Such a plaintiff may, in accordance with his writing, be a corporation seeking privacy for its meetings.

On the principle in *ABC's* case that a corporation cannot enjoy a right to privacy, it has been argued that privacy is not necessarily a personal right of which only natural persons can take advantage; and that broadly speaking, it ought to be recognised that it is contradictory for a legal system to create fictitious persons and conversely use their very fictitiousness as a reason for denying them legal rights.<sup>310</sup> Taylor<sup>311</sup> argued that corporations do not deserve to be side-lined from important rights such as privacy, although noting that it does not mean that corporation's privacy protection should be as exclusive as that of the individual; however they ought not to be wholly excluded from privacy protection either. Additionally, Taylor<sup>312</sup> also indicated that corporations do come in all shapes and sizes, and are set up for different purposes, and as such, it would be too simplistic and untenable to assume that their interests are always commercial. Indeed, as noted by Taylor,<sup>313</sup> not all corporations exist for profit making; and as such, a denial of privacy to corporations on the ground which is often stated – that they exist for economic reasons – is unacceptable; as some corporations do exist primarily to serve the public. Instances of organisations not setup solely for economic purposes, or even at all, may include some non-governmental organisations and charities, universities, government owned medical institution, associations for promoting the ideals of the United Nations, associations for the advancement of

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<sup>310</sup> Taylor, G., Wright, D. Privacy, Injunctions and Possums: An Analysis of the High Court's Decision in *Australia Broadcasting Corporation v Lenah Game Meats*. *Melbourne University Law Review*. 2002, 26(3): 707, section 11(d) @

<http://www.austlii.edu.au/au/journals/MelbULawRw/2002/36.html#Heading94> Accessed on 2/7/2012.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

international understanding, Amnesty International and other worthy causes, churches, sundry voluntary associations, pressure groups, private scholarship bodies.

Further regarding the principle that corporations cannot enjoy a right to privacy in *ABC's* case, this case is very well distinguished from the position in English law on the basis that there are legal provisions such as the European Convention on Human Rights 1950 [ECHR] which is interpreted under the influence of the Human Rights Act 1998 to proclaim the value of privacy in English law, and this has been developed in favour of a broader role for privacy in the legal system generally; however, in Australia, there is no such pre-existing public law value.<sup>314</sup> It may also be distinguished from the position in English law in the light of the statutory protection provided by the Broadcasting Act 1996, in broadcasting matters, as applied in the *R v Broadcasting Standards Commission ex parte BBC*<sup>315</sup> case.

In any case, Callinan. J in noting that a right of privacy of the corporation has been held to exist, in part, as a result of the above *R v Broadcasting Standards Commission ex parte BBC* case,<sup>316</sup> accepted the possibility that in certain cases a corporation may enjoy privacy, thus

For my own part, I would not rule out the possibility that in some circumstances, despite its existence as a non-natural statutory creature, a corporation might be able to enjoy the same or similar rights to privacy as a natural person, not inconsistent with its accountability, and obligations of disclosure, reporting and otherwise. Nor would I rule out the possibility that a government or a governmental agency may enjoy a similar right to privacy over and above a right to confidentiality in respect of matters relating to foreign relations, national security or the ordinary business of government.<sup>317</sup>

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<sup>314</sup> See Taylor, G., Wright, D. Privacy, Injunctions and Possums: An Analysis of the High Court's Decision in *Australia Broadcasting Corporation v Lenah Game Meats*. *Melbourne University Law Review*. 2002, 26(3):707, Section11(b)@ <http://www.austlii.edu.au/au/journals/MelbULawRw/2002/36.html#Heading94> Accessed on 2/7/2012.

<sup>315</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

<sup>316</sup> Ibid. Callinan J. at para 326.

<sup>317</sup> Para 328. For a general analysis of the *Australia Broadcasting Corporation v Lenah* case, see Taylor, ibid. See also Heath, W. Possum Processing, Picture Pilfering, Publication and Privacy: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*. *Monash University Law Review*. 2002: 28(1), 162-180 @

From the above, therefore, although other common law jurisdictions may not currently provide protection for the corporation's privacy, it is submitted that the case of English law is distinctly different because it follows from a corporation's autonomy that a corporation has privacy concerns which ought to be protected, and the Broadcasting Act 1996 correctly codifies this notion. In addition, more recently, the jurisprudence of the European Court of Human Right and the Court of Justice of the European Union further establishes this notion.

## OTHER COMMON LAW ACTIONS

### Malicious falsehood

The cause of action of malicious falsehood emerged from the cause of action of slander of title.<sup>318</sup> Malicious falsehood was described as 'a specie of defamation' by Staughton LJ in *Khodaparast v Shad*.<sup>319</sup> However, as clarified by Carty<sup>320</sup> 'in spite of its name, slander of title was not derived or descended from the defamation torts of libel and slander; rather, it was a cause of action for special damage resulting from a falsehood'. From this cause of action, malicious falsehood emerged, and came to concern false statements, oral or written, which have been made maliciously.<sup>321</sup> The protection involved in malicious falsehood is the protection against malice, as well as falsehood. In order for this cause of action to succeed, malice and falsehood must have to be specifically proved; in the words of Carty, "[t]he claimant needs to prove a falsehood, published maliciously, which is calculated to produce and does produce pecuniary damage".<sup>322</sup>

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[http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MonashULawRw/2002/8.html?stem=0&synonyms=0&query=title\(australian%20broadcasting%20corporation%20and%20lenah%20](http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MonashULawRw/2002/8.html?stem=0&synonyms=0&query=title(australian%20broadcasting%20corporation%20and%20lenah%20) Accessed on 3/7/2012;

Stewart, D. Protecting Privacy, Property, and Possums: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd. *Federal Law Review*. 2002, 6@

[http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedLawRw/2002/6.html?stem=0&synonyms=0&query=title\(australian%20broadcasting%20corporation%20and%20lenah%20](http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedLawRw/2002/6.html?stem=0&synonyms=0&query=title(australian%20broadcasting%20corporation%20and%20lenah%20) Accessed on 2/7/2012.

<sup>318</sup> Carty, H. *An Analysis of the Economic Torts*. 2<sup>nd</sup> edn. Oxford: Oxford University Press, 2010.

<sup>319</sup> *Khodaparast v Shad* [2000] 1 WLR 618, 42.

<sup>320</sup> Carty, *ibid*, 200.

<sup>321</sup> *Ratcliffe v Evans* [1892] 2 QB 524; see also Carty, *ibid*.

<sup>322</sup> At 203. For a detailed discussion on malicious falsehood – its history, ingredients for liability, and its relationship with other torts, see generally, Carty, *ibid*.

Malicious falsehood was one of the mediums into which the protection of the individual's privacy was erstwhile shoehorned before an independent cause of action emerged in English law.<sup>323</sup> This is illustrated in the notable case of *Kaye v Robertson*.<sup>324</sup> In this case, a well-known actor who was recovering in hospital, having undergone very extensive surgery due to severe head injuries sustained in a car accident, was interviewed by journalists who improperly gained access to his room contrary to notices placed against such entry. Photographs were also taken, and the journalists subsequently announced that they intended to publish the interview. The plaintiff sought to protect his privacy, but in the absence of an independent cause of action for privacy at the time, the plaintiff, through his next friend, sought an interlocutory injunction against this publication through a host of actions. Consequently, malicious falsehood, libel, trespass to person, and passing off were relied upon. He claimed that he had not consented to the interview, and had not been in a fit state to consent.

An injunction against publication was granted, but subsequently discharged on appeal. At the Court of Appeal, it was held as follows: that there was no passing off as the plaintiff was not a trader; on the claim of battery, there was no evidence that damage had in fact been caused; there was no libel; that there was no actionable right of privacy in English law; and that the elements of a claim for malicious falsehood had been made out. Malicious falsehood was the only grounds upon which the Court of Appeal felt able to grant relief on the basis that Mr Kaye had a commercial interest in his first interview following his accident, and that the newspaper would misleadingly damage this commercial interest if it suggested to the public that Mr Kaye had given this interview voluntarily. The court did not therefore restrain publication of the interview, because it felt unable to do so; all it could do was restrain publication of the interview without a clear indication that it had been given involuntarily. The newspaper accordingly went ahead and published the interview, notwithstanding the fact that it had been obtained without Mr Kaye's consent.

In light of the apparent inadequacy in the law with regards to the protection of an individual's privacy, the Court of Appeal in arriving at its judgment was unanimous in

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<sup>323</sup> The independent cause of action for the protection of privacy in English law is discussed in chapter 3.

<sup>324</sup> *Kaye v Robertson* [1991] FSR 62.

its call for a legal right to privacy. Glidewell LJ in acknowledging the keen need for a right of privacy declared

It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.<sup>325</sup>

Glidewell LJ noted that in the absence of such a right, the plaintiff had sought a remedy through other established rights of action.

Bingham LJ added

This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens ... If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery... It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.<sup>326</sup>

Bingham LJ restated Professor Markesinis<sup>327</sup> position that although many aspects of privacy were protected by a host of existing torts, it however entailed fitting the facts of each privacy case into the pigeon-hole of an existing tort which may not only involve strained constructions; but often, may also leave a deserving plaintiff without a remedy.<sup>328</sup>

From the above therefore, it is suggested that malicious falsehood served as a medium through which privacy was sought to be protected; however, it did not ultimately provide protection for privacy, as illustrated above. Drawing from the above declarations, also, it is further suggested that malicious falsehood does not, and would

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<sup>325</sup> At 66.

<sup>326</sup> At 70.

<sup>327</sup> Markesinis, B. *The German Law of Torts*. 2nd edn. Oxford: Clarendon Press, 1990, 316.

<sup>328</sup> This case is further discussed in part 1 of chapter 3.

not provide privacy protection for the corporation. This is because the interests protected in both causes of action are different – malicious falsehood involves the protection against malice and falsehoods; while privacy protects against intrusion and misuse of private information. Furthermore, the information involved in the case of privacy is truthful information – there is no falsehood to it. Consequently, seeking to shoe-horn the protection of privacy for the corporation within the cause of action of malicious falsehood would bring about a strained construction of the concept of privacy; again as observed in the case of the individual under *Kaye*, it was not achievable.

Accordingly, in view of the above declarations in *Kaye*'s case, as well as the difference in the interests the actions of malicious falsehood and privacy protect, it is submitted that malicious falsehood does not protect privacy; and for the same reasons, is not a medium through which the protection of the privacy of the corporation ought to be sought.

## **Defamation**

Defamation concerns defamatory statements made either in writing or orally. The interest involved in this cause of action is the protection of the reputation from libellous or slanderous statements. Defamation was another medium into which the protection of the individual's privacy was erstwhile shoehorned before an independent cause of action emerged in English law, as has been demonstrated by *Kaye*'s case in the malicious falsehood section above. Although there are some similarities between defamation and privacy,<sup>329</sup> there are arguably weightier differences between the two actions. The most profound distinction lies in the fact that for a matter to be successful under defamation, the defamatory statements or publication must be false, as truth is an absolute defence; conversely, under privacy, the statements or publication are true representations, the issue therein is that there has been an intrusion and/or the publication of private information without the consent of the complainant. It is suggested that where the statements made are false – misrepresentation of facts, it becomes a case which properly falls within the realm of defamation; conversely, where

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<sup>329</sup> Such as the fact that dissemination of information [without consent] is involved.

the statements made are true – true representation of facts, such a case would be properly dealt with under privacy. This was the case in *Kaye v Robertson*,<sup>330</sup> wherein a prayer for an interlocutory injunction based on the reliance on, *inter alia*, libel was rejected because according to the court, ‘an interlocutory injunction should only be granted where any jury would inevitably find for libel, and this was not the case here’.<sup>331</sup> In declarations which suggested that the case of Kaye was a clear privacy case, the court went on to lament the absence of a cause of action for the protection of privacy in English law, stating that it is an invasion of privacy which was the foundation of *Kaye’s* case, as has been set out in the malicious falsehood, section above.

It is also noted that where some statements made are true and others are false, then it becomes the case for two causes of action – privacy and defamation – wherein it is argued, either cause of action would not satisfy all the issues.

Similarly, another difference between defamation and privacy lies in the principle that in defamation, the statements made must be defamatory and have a tendency to lower the victim of the statement before right thinking members of the society; thus, an attack on the reputation, and in the case of the corporation, the property interest. Therefore, a defamation action arises from the defamatory statement made. Conversely, under privacy, rarely can a statement be said to be defamatory to a complainant.<sup>332</sup> It is rather argued that in privacy, it is the action behind the statement which is then disseminated or published without the consent of the complainant that is the issue. Thus, where the statement is a true representation of the actions of the said complainant as is the case in privacy matters, the issue would be one involving intrusion, and misuse of private information of the claimant.

Drawing from the above declarations by the court in *Kaye’s* case regarding the causes of action of libel and privacy, therefore, it is suggested that although defamation was a medium through which privacy was sought to be protected, it did not guarantee protection for privacy. In addition, in view of the above discussions on the distinction between defamation and privacy, it is further suggested that defamation does not, and

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<sup>330</sup> *Kaye v Robertson* [1991] FSR 62. Discussed above.

<sup>331</sup> Para 62.

<sup>332</sup> See generally, Warby, M., Moreham, N. and Christie, I. (eds) *Tugendhat and Christie: The Law of Privacy and the Media*. Oxford: Oxford University Press, 2011, chapter 7, especially para 7.10.



would not provide privacy protection for the corporation. This is based on the fact that the truthfulness of a statement under defamation is an absolute defence; while under privacy, the focus is on the protection against intrusion and misuse of private information which has been interfered with without consent. As indicated in the malicious falsehood section above, the information involved in the case of privacy is truthful information – there is no falsehood to it. As put by Parkes,<sup>333</sup> ‘a claimant complaining of the publication of private facts which can be proved to be true has no redress in the law of defamation, even though the publication of the said information may be just as intrusive and hurtful as the publication of false allegations’.

In view of the above declarations, seeking to shoe-horn the protection of privacy for the corporation within the cause of action of defamation would bring about little or no protection for privacy, as observed in the case of the individual under *Kaye’s* case. Accordingly, it is submitted that defamation does not protect privacy; and for the same reasons, is not a medium through which the protection of the privacy of the corporation ought to be sought. While the corporation’s defamation involves the protection of the reputation based on property;<sup>334</sup> the corporation’s privacy involves the protection of the corporation’s autonomy to carry on its activities, within the law, without unwanted and unjustified interference.

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<sup>333</sup> Parkes, R. in Warby, M., Moreham, N. and Christie, I. (eds) *Tugendhat and Christie: The Law Of Privacy And The Media*. Oxford: Oxford University Press, 2011, 328.

<sup>334</sup> This is discussed in part 3 of chapter 1.

## PART 2

### STATUTE

As indicated at the beginning of this chapter, in seeking to answer the research question of whether English law ought to be further developed to provide fuller protection for the privacy of the corporation, it is essential to, in addition to common law, investigate whether the English statute offers protection for the privacy of the corporation, and if so, the extent of such protection. This Part therefore investigates the United Kingdom legislation – the Data Protection Act 1998, Protection from Harassment Act 1997, and the Broadcasting Act 1996 – which protect certain aspects of privacy and establishes that the Broadcasting Act 1996 is the only statute therein which protects the privacy of the corporation.

#### *Data Protection Act 1998*

The Data Protection Act 1998 which came into force on March 1 2000 was passed to give effect to European Directive 95/46 EC. As indicated by Barnes in Tugendhat and Christie, the implementation of the Directive throughout the European Union was intended to give effect in the context of data protection to Article 8 ECHR right to respect for private life, family life home and correspondence. He continues that Recital 9 makes clear that the Act “is expressly concerned with the right to privacy and [lays] down requirements for Member States to adopt data protection legislation at national level in order to protect privacy in relation to both computerized and manual files”.<sup>335</sup> Consequently, he states that the Data Protection Act 1998 is part of the law of privacy, although the word ‘privacy’ is notably absent from the United Kingdom legislation.

Pursuant thereto, and in accordance with the introductory text of the Data Protection Act 1998, the Data Protection Act is ‘an Act to make new provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information’. From this text, it is clear that the Data Protection Act 1998 is an Act which provides exclusive protection for the privacy of

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<sup>335</sup> Warby, M., Moreham, N. and Christie, I. (eds) *Tugendhat and Christie: The Law Of Privacy And The Media*. Oxford: Oxford University Press, 2011, 271.

the individual's personal data – his private information; it does not prescribe protection for the privacy of the corporation.

Equally, the focus on the individual can be seen in the deliberations of the House of Lords in the debates that preceded the Act. During the deliberations on the Data Protection Bill by the House of Lords, repeated references were made to the protection of the individual by Lords William of Mostyn, Lord Norton, and Lord Falconer of Thoroton with regards to the individual's activities, the individual's personal data, as well as the rights and exemptions which the individual enjoys under the Bill, respectively.<sup>336</sup> Similarly, Lord Burlison, indicated that when the Data Protection Act is brought into force, it would give effect to Directive 95/46/EC which protects individuals with regard to the processing of personal data and the free movement of such data.<sup>337</sup>

Furthermore, in accordance with to Section 1(1) Data Protection Act 1998, on the basic interpretation of provisions,

“Data subject” means an individual who is the subject of personal data;  
“personal data” means data which relate to a living individual who can be identified... and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual...

From the above interpretative definitions of data subject and personal data, it is quite clear that the Data Protection Act 1998 does not prescribe protection for the corporation. Rather, it is an Act that controls how a *living individual's* personal information is used by organizations, businesses or the government; for instance, data on an individual's mental or physical health or conditions, religious beliefs, racial or ethnic background, sexual life, and criminal records.<sup>338</sup>

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<sup>336</sup> HANSARD HL Debate, Data Protection Bill, 16 March 1998 Volume 587 cc495-543@ [http://hansard.millbanksystems.com/lords/1998/mar/16/data-protection-bill-hl-1#S5LV0587P0\\_19980316\\_HOL\\_413](http://hansard.millbanksystems.com/lords/1998/mar/16/data-protection-bill-hl-1#S5LV0587P0_19980316_HOL_413) Accessed on the 30/7/2014.

<sup>337</sup> HANSARD HL Debate, Data Protection Legislation, 04 May 1999 Volume 600 cc71-2WA @ [http://hansard.millbanksystems.com/written\\_answers/1999/may/04/data-protection-legislation#S5LV0600P0\\_19990504\\_LWA\\_24](http://hansard.millbanksystems.com/written_answers/1999/may/04/data-protection-legislation#S5LV0600P0_19990504_LWA_24) Accessed on the 30/7/2014.

<sup>338</sup> See generally, GOV.UK on Data protection @ <https://www.gov.uk/data-protection/the-data-protection-act> Accessed on the 30/7/2014.

### *Protection from Harassment Act 1997*

In accordance with the introductory text of the Protection from Harassment Act 1997, the Act is 'an Act which makes provisions for protecting persons from harassment and similar conduct'. In this Act, the protection for the privacy of corporations was not envisaged at the time of its institution; it is an Act which focuses on the protection of the individual. This is demonstrated by the aim of the Act as espoused before the House of Lords by the Lord Chancellor, Lord Mackay of Clashfern.

To this end, the Lord Chancellor, in praying to move for the second reading of the Protection from Harassment Bill declared

The aim of this Bill is to protect the victims of harassment. It will protect all such victims whatever the source of the harassment – so-called stalking behaviour, racial harassment, or anti-social behaviour by neighbours... [T]he cases which have come to public attention in the past year or two... have highlighted the devastating effect that those who cause harassment to others can have on the lives of their victims.<sup>339</sup>

Furthermore, the Lord Chancellor in further focusing on the individual, rationalized the need for the legislation by declaring

Perhaps the first question the Government must answer when bringing legislation before your House is as to why the legislation is needed. In the case of the conduct in question--causing harassment--there is evidence that the courts themselves are already interpreting their existing powers in such a way as to provide relief for victims. The civil courts have granted injunctions to prevent the repetition of such behaviour and the criminal courts have, in some cases, equated severe psychological harm to bodily harm. In the light of those developments, is new legislation necessary? The Government's answer to that question is an emphatic yes.<sup>340</sup>

Equally, the protection for the privacy of corporations is not provided for from the provisions of the Protection from Harassment Act 1997. The focus on the individual is

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<sup>339</sup> HANSARD HL Protection from Harassment Bill Reading @ <http://www.publications.parliament.uk/pa/ld199697/ldhansrd/vo970124/text/70124-01.htm>  
Accessed on the 2/6/2014.

<sup>340</sup> HANSARD HL Protection from Harassment Bill Reading, *ibid.*

demonstrated by sections 4(1) and 8(1)&(3) of the Act. Section 4(1) which speaks to putting people in fear of violence states

A person whose course of conduct causes another to *fear*, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

Section 8(1) states

Every individual has a right to be free from harassment...

Further, section 8(3) sets out what harassment of the individual entails

For the purposes of this section – “harassment” of a person includes causing the person alarm or distress; and a course of conduct must involve conduct on at least two occasions.

Case law has further established that the corporation is not entitled to protection under the Protection from Harassment Act 1997. This is illustrated in the case of *DPP v Dziurzynski*,<sup>341</sup> wherein the respondent was charged with offences contrary to sections 2(1) and (2) of the Act. On the question of whether the words of the Protection from Harassment Act 1997 covered an offence whereby a corporation was capable of being harassed, Rose LJ and Gibbs J referred to the history of the Act, including the Home Office consultation paper which preceded the legislation (*“Stalking – The Solutions”*) and ministerial statements, and stated

Those statements made it clear that “the Bill covers not only stalkers but disruptive neighbours and those who target people because of the colour of their skin” ( *Hansard* , December 17, 1997, Volume 781). This was further supported by ministerial statements and the unreported decision of Douglas Brown J. in *Tuppen & Singh v. Microsoft Corporation*, July 14, 2000, which both confirmed that the Act was designed to replace sections 4(1)(a) and 5 of the Public Order Act 1986.<sup>342</sup>

Consequently, Rose LJ and Gibbs J therefore declared

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<sup>341</sup> *DPP v Dziurzynski* [2002] ACD 88.

<sup>342</sup> Para 2.

Reference could properly be made to the legislative history of the 1997 Act in order to construe the meaning of “person” and this pointed against person meaning corporation...<sup>343</sup>

Equally, in *Daiichi Pharmaceuticals UK Ltd and others v Stop Huntingdon Animal Cruelty and others*<sup>344</sup> wherein five claimants, both individuals and corporations, applied for injunctive relief under section 3 of the Protection from Harassment Act 1997, seeking protection from conduct by the defendants allegedly amounting to harassment under section 7 of the Act, the court allowed the applications of the individual claimants but dismissed those of the corporate claimants. On the proper construction the term “person” in section 7 of the 1997 Act, Owen J. declared

It is submitted by counsel for the represented defendants that on the proper construction of the Act, the term “person” does not include a limited company, and that in consequence a company cannot be the victim of harassment and cannot bring a claim under the Act... In my judgment the word “person” in section 1 of the Act does not on its proper construction embrace a corporate entity.<sup>345</sup>

Furthermore, in *Majrowski v Guy's and St Thomas's NHS Trust*,<sup>346</sup> the House of Lords went further to declare that a corporation may be a perpetrator of harassment, but cannot be a victim. Herein, a claimant brought an action against his employer for breach of statutory duty, alleging that he had been unlawfully harassed by his departmental manager in breach of section 1 of the Protection from Harassment Act 1997; and that the employer, a corporation, was vicariously liable. In the course of the judgment,<sup>347</sup> Lord Nicholls declared

This statutory prohibition applies as much between an employer and an employee as it does between any other two persons. Further, it is now tolerably

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<sup>343</sup> Para 3.

<sup>344</sup> *Daiichi Pharmaceuticals UK Ltd and others v Stop Huntingdon Animal Cruelty and others* [2004] 1 WLR 1503.

<sup>345</sup> Paras 13 and 20.

<sup>346</sup> *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224.

<sup>347</sup> The House of Lords upheld the judgment of the County Court judge who struck out the claim as disclosing no reasonable cause of action, on the grounds that section 3 of the Act did not create a statutory tort for which an employer could be vicariously liable.

clear that, although the victim must be an individual, the perpetrator may be a corporate body.<sup>348</sup>

From the above declarations, therefore, it is suggested that the Protection from Harassment Act 1997 is an Act which provides protection for the privacy of the individual alone; it does not prescribe protection for the privacy of the corporation.

### ***The Broadcasting Act 1996***

The privacy of corporations in the United Kingdom is to a limited extent protected by the Broadcasting Act 1996.<sup>349</sup> In this Act, the United Kingdom Parliament recognised the right of corporations to the protection of its privacy, with respect specifically to broadcasting matters; and accorded it such a right under sections 110(1)(b), and 111(1) of the Broadcasting Act 1996.

Section 110(1)(b) provides for the functions of the Broadcasting Standards Commission (BSC), and states that

...it shall be the duty of the BSC to consider and adjudicate on complaints which are made to them in accordance with section 111... and relate to an unwarranted infringement of privacy in, or in connection with the obtaining of material included in, such programmes.<sup>350</sup>

Section 111(1) which deals with matters concerning broadcasting provides that

A fairness complaint may be made by an individual or a body of persons, whether incorporated or not...

The combined effect of these two sections is that individuals, as well as incorporated persons such as corporations, may make a fairness complaint concerning an

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<sup>348</sup> Para 19.

<sup>349</sup> The privacy of the individual is also protected in broadcasting matters by the Broadcasting Act 1996.

<sup>350</sup> Such programmes according to section 107(5) Broadcasting Act 1996, as follows

(a) any programme broadcast by the BBC,

(b) any programme broadcast by the Welsh Authority or included in the service referred to in section 57(1A)(a) of the 1990 Act, and

(c) any programme included in a licensed service.

infringement of privacy on matters specifically related to broadcasting to the BSC for consideration and adjudication. From the above sections, therefore, it is clear that Parliament provided privacy protection not just for the individual, but also for incorporated persons with respect to broadcasting matters.

The protection of the privacy of the corporation by Parliament is not unique to the Act of 1996. From the legislative history of the Broadcasting Act, it is observed that the first Broadcasting Act which was enacted in 1980<sup>351</sup> also provided privacy protection for incorporated persons, in relation to broadcasting matters. Section 18(1)(b) of the Broadcasting Act 1980 provided for the functions of the Broadcasting Complaints Commission, which were very much akin to the functions of the Broadcasting Standards Commission in the Act of 1996. The section stated that

...the functions of the commission shall be to consider and adjudicate upon complaints of [*inter alia*] unwarranted infringement of privacy...

Similarly, section 19(2) of the 1980 Act which provided for making and entertainment of broadcasting complaints, very much like section 111(1) of the Act of 1996 adds that:

A complaint may be made by an individual or by a body of persons, whether incorporated or not...

These two key sections, section 18(1)(b) and section 19(2) of the Broadcasting Act of 1980 which initiated privacy protection for individuals as well as incorporated persons in broadcasting matters, were replicated in section 54(1)(b) and section 55(2) of the Broadcasting Act of 1981, and further reiterated in section 143(1)(b) and section 144(2) of the Broadcasting Act of 1990 respectively. These two sections were again replicated in the present sections 110(1)(b), and 111(1) of the Broadcasting Act 1996.

It is therefore submitted, that in accordance with the provisions of the Act of 1980 and the subsequent amendments of the Acts of 1981, 1990, and 1996 noted above, it was the firm intention of Parliament to provide privacy protection for incorporated persons

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<sup>351</sup> The Broadcasting Act 1980 was an act that amended and supplemented the Independent Broadcasting Authority Act 1973 and established a Broadcasting Complaints Commission, and also initiated privacy protection in matters of broadcasting, for individuals and incorporated persons. It was repealed by the 1981 Act, which in turn was repealed by the 1990 Act, which was also repealed by the 1996 Broadcasting Act.



in matters specific to broadcasting. This intention of Parliament is demonstrated in the HANSARD HL debate on the Broadcasting Bill 1980<sup>352</sup> in which the House of Lords heavily debated the bill before it was passed to law, including the relevant sections on the protection of the privacy of the incorporated persons.

In debating the bill, a proposed amendment was initially called for to the effect that the 1980 Act would allow only the individual to bring a complaint.<sup>353</sup>

Lord Belstead stated

The purpose of this amendment is to allow individuals, and only individuals, to initiate what would be the expensive and time-consuming process of what may be called a BCC investigation... Corporations can generally look after themselves. They have the power to protest and the resources to sue. Therefore the effect of that amendment would be to confine the complaints procedure or the initiation of that procedure to individuals.<sup>354</sup>

However, Lord Somers challenged this proposition, stating that the Act ought not to be limited to individuals, as this would alienate such groups as the National Viewers' and Listeners' Association from being able to make a complaint.<sup>355</sup>

Additionally, Lord Drumalbyn stressed the aim of the amendment, thus

Apparently what these amendments are trying to do—I commend it—is to give an opportunity for a falsehood or a false impression to be corrected... It is only a question of establishing the truth and vindicating the truth where something has gone wrong. I think it is particularly important, because this is one of the great causes of complaint, [and] is also something that should be corrected, and I do not see why it should not be corrected for corporations and institutions, and all the rest as well as individuals.<sup>356</sup>

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<sup>352</sup> HANSARD [HL Debate] 15<sup>th</sup> October, 1980.

<sup>353</sup> Amendment 33. Lord Hooson proposed to move amendments 33 and 34 together. At 1303.

<sup>354</sup> At 1303-1304.

<sup>355</sup> At 1310.

<sup>356</sup> At 1312-1313.

Lord Drumalbyn noted that groups such as mental hospitals, tourist agencies, schools, or football teams, like individuals, ought to be able to bring a complaint and have the truth established.

Lord Belstead reiterated Lord Drumalbyn's above statement, and concluded by declaring that the Bill was purposely drawn to provide that a complaint should lie where a programme might be held to have treated an individual or an organisation unfairly.<sup>357</sup>

In the light of the above debate the protection of the privacy of the corporation was maintained in the Broadcasting Act 1996. From the above, it is submitted that it was clearly the intention of Parliament in enacting the Broadcasting Act 1980 to accommodate complaints made not only by individuals, but also by corporations in their own right, and not of the natural persons upon whose behalf it acted.

Case law application of sections 110(1)(b) and 111(1) of the Broadcasting Act 1996

The application of sections 110(1)(b) and 111(1) of the Broadcasting Act 1996 right of the corporation to the protection of its privacy in broadcasting matters was illustrated in the case of *R v Broadcasting Standards Commission ex parte BBC*,<sup>358</sup> in which programme makers for a broadcasting company secretly filmed transactions in plaintiff's store without the plaintiff's permission. The plaintiff, DSG Retail Ltd, made a complaint to the Broadcasting Standards Commission (the BSC) that the secret filming had been an unwarranted infringement of its privacy within sections 110 and 111 of the Broadcasting Act 1996.

The BSC found that the secret filming had infringed the plaintiff's privacy and that the infringement was unwarranted and as such upheld the complaint.

In the light of this, the BBC applied for judicial review. The court of first instance held, *inter alia*, that a body corporate as a matter of law did not have a right to privacy and as such could not bring a complaint for an infringement of privacy under the Broadcasting Act 1996, furthermore, there could not be an infringement of privacy by the mere fact of surreptitious filming in a place to which the public had access if there

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<sup>357</sup> At 1319.

<sup>358</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

was no element of seclusion in the event being filmed. He therefore quashed the BSC's finding.

On appeal by the BSC, the Court of Appeal reversed the holding of the lower court and unanimously held, *inter alia*, that on a proper construction of section 110 and 111 of the Broadcasting Act 1996, a company could make a complaint of unwarranted infringement of its privacy, and as such, the BSC had been entitled to conclude that secret filming of transactions in the plaintiff's stores was an infringement of the plaintiff's privacy. Accordingly, the Court of Appeal restored BSC's adjudication.

In the course of his judgment, Lord Woolf MR asked the question: under the Act, can a company be the subject of a complaint of unwarranted interference with its privacy? To which he declared

There is no dispute that a company can make a complaint. This is categorically stated in section 111(1) of the Act. Section 111(1) provides:

(1) A fairness complaint may be made by an individual or a body of persons, whether incorporated or not, but, subject to subsection (2), shall not be entertained by the BSC unless made by the person affected or by a person authorised by him to make the complaint for him. A "fairness complaint" is defined as meaning a complaint of any of the matters referred to in section 110(1) and so it applies to complaints of both unjust or unfair treatment and unwarranted infringement of privacy.<sup>359</sup>... Accordingly, to provide no protection under the Act for activities of a company of this nature would leave a company at a disadvantage under legislation designed to encourage and achieve proper standards of conduct. This is most unlikely to be what Parliament intended.<sup>360</sup>

Although this case specifically dealt with the corporation's privacy under the Broadcasting Act 1996, Lord Woolf MR generally recognised that a corporation could

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<sup>359</sup> Para 29-30.

<sup>360</sup> Para 34.

suffer an infringement of its privacy which he referred to as 'an intrusion of the corporation's privacy'.<sup>361</sup>

To this end, he stated

While the intrusions into the privacy of an individual which are possible are no doubt more extensive than the infringements of privacy which are possible in the case of a company, a company does have activities of a private nature which need protection from unwarranted intrusion [such as if an intruder] without any justification attempted to listen clandestinely to the activities of a board meeting. The same would be true of secret filming of the board meeting. The individual members of the board would no doubt have grounds for complaint, but so would the board and thus the company as a whole. The company has correspondence which it could justifiably regard as private and the broadcasting of the contents of that correspondence would be an intrusion on its privacy. It could not possibly be said that to hold such actions an intrusion of privacy conflicts with the Convention.<sup>362</sup>

Consequently, his Lordship concluded

The [Broadcasting] Act extends to unwarranted interference with the privacy of a company.<sup>363</sup>

From the above declarations by Woolf LJ, it is clear that a corporation can suffer an infringement of privacy in its own right as a corporation, independent of the individuals in it.

On the intention of the Broadcasting Act as an Act for the protection of not just the individual's privacy, but also the corporation's privacy in broadcasting matters, Hale LJ declared

The provisions of the Act are quite clear. A "body of persons, whether incorporated or not" has the right to make a fairness complaint: section 111(1)... It is, I acknowledge, surprising that section 111(2) and (3) also refer

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<sup>361</sup> Para 33.

<sup>362</sup> Para 33.

<sup>363</sup> Para 34.

to a "person or body", but had the draftsman intended to confine a "person affected" to an individual he could and, in my view, would have done so.<sup>364</sup>

On the definition of privacy, Hale LJ stated

Privacy is a difficult word for which to find synonyms (let alone to define by examples of interference, as the reports cited to us acknowledge) but the *Concise Oxford Dictionary*, 9th ed (1995), includes "avoidance of publicity" and it obviously has some connection with being or keeping "private".<sup>365</sup>

Furthermore, on the nature of a corporation's privacy Hale LJ declared

There are many things which companies may (legitimately or illegitimately) wish to keep private, including their property, their meetings and their correspondence. There are still more about which they may (legitimately or illegitimately) wish to avoid publicity... Notions of what an individual might or might want to be kept "private", "secret" or "secluded" are subjective to that individual... If this is so for an individual, I cannot see why it should not also be capable of being so for a company. The company will have its own reasons (good or bad) for wanting or not wanting to object and the secrecy of the filming has deprived it of the opportunity to do so.<sup>366</sup>

As such, Hale LJ acknowledged that the corporation can enjoy privacy and has many things or activities which it may wish to keep private. It is suggested that Lord Woolf MR and Hale LJ in expressing the concept of privacy for corporation – the nature of a company's activities of a private nature such as the clandestine listening to, or the secret filming of the activities of a board meeting; or the many things which a company may wish to keep private such as its property or correspondence – were referring to generic corporations.

Lord Mustill on the other hand had difficulty in accepting that a corporation may have its privacy invaded. To this end Lord Mustill stated

...it is equally clear that a corporate body may act as complainant: again, section 111(1) says so. This presents no conceptual problems, for a corporate

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<sup>364</sup> Para 41.

<sup>365</sup> Para 42.

<sup>366</sup> Para 42-43.

employer may wish to present a complaint on behalf of an individual employee, just as much for an invasion of privacy as for unfairness. Nor is there any difficulty where a body puts forward a complaint on its own behalf under section 110(1)(a), for a corporation as well as an individual may be unfairly treated. The Act does not, however, explicitly address the position under section 110(1)(b).<sup>367</sup>

Lord Mustill went on to query

Can a company say that it is aggrieved by an invasion of its own privacy? As a matter of ordinary language I would not have thought so.<sup>368</sup>

Lord Mustill in acknowledging that the concept of privacy was hard to define however took the view that the concept as he understood it involved the protection of the individual

...for in general I find the concept of a company's privacy hard to grasp. To my mind the privacy of a human being denotes at the same time the personal "space" in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate. The concept is hard indeed to define, but if this gives something of its flavour I do not see how it can apply to an impersonal corporate body, which has no sensitivities to wound, and no selfhood to protect.<sup>369</sup>

It is suggested that Lord Mustill, from his above declarations which suggests that the protection of privacy for the corporation under the Broadcasting Act is an artificially constructed recognition of privacy, admittedly did not fully appreciate the full extent of the concept of privacy. This may be because the case was heard on the threshold of the coming into force of the HRA when a broader understanding of privacy had not been contemplated. Besides, in accordance with Lord Woolf's declaration in *R v*

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<sup>367</sup> Para 46.

<sup>368</sup> Para 46.

<sup>369</sup> Para 48.

*Broadcasting Standards Commission ex parte BBC*<sup>370</sup> that ‘in difficult cases, it is perfectly appropriate to have regard to the jurisprudence of the ECtHR, the ECJ, and of other countries’;<sup>371</sup> there were at the time of the present case, no ECtHR and ECJ cases on the corporation’s privacy to fully serve as guidance on the present case. As the ECtHR and ECJ jurisprudence on privacy continues to evolve, it has been established thus far that the concept of privacy involves much more than just the protection of the individual; it also affords protection to the corporation as will be analysed in chapter 3. Equally, as has been established in part 3 of this chapter, privacy encompasses the protection of not just the individual but also the corporation. It will be recalled that privacy for the corporation was held to involve the freedom from unwanted interference or disturbance – intrusion – into the corporation’s private sphere, which includes its home or its property, and which represents its own space; as well as a claim to the control of the corporation’s private information from being released into the public domain against the corporation’s wishes, thus protecting the said information from unwanted dissemination or publication.

The above objection, it is suggested, accords with Lord Mustill’s concluding statement that

... when it becomes necessary to consider the question [of a general appreciation of privacy] in the much wider context of human rights, as it surely will, there may well be room for more than one opinion about what the concept entails.<sup>372</sup>

In any case, in spite of Lord Mustill’s above reluctance, he nevertheless applied the Act and ruled in favour of privacy protection for the corporation. It is therefore submitted that although Lord Mustill suggested that privacy protection under the Broadcasting Act is more suited for the individual, the Broadcasting Act is nevertheless an Act of Parliament which has protected the privacy of corporations in broadcasting matters since its inception in 1980 to the present Act, and as such, the Court of Appeal were obliged to apply this law in the said *R v Broadcasting Standards Commission ex parte BBC*;<sup>373</sup> and did so unanimously. In the light of this therefore, it

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<sup>370</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

<sup>371</sup> Para 17.

<sup>372</sup> Para 50.

<sup>373</sup> *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885.

is further submitted that although privacy applies to the individual in a great many instances, there are also circumstances in which the concept of privacy applies to corporations as reflected in the judgment of this case; accordingly, this judgment serves as a precedent for the protection of privacy for the corporation, as far as it concerns broadcasting matters.

In spite of this judgment however, privacy is in more general terms deemed a concept which cannot apply to corporations under English law.<sup>374</sup>

## CONCLUSION

This chapter has investigated the level of protection of the privacy of the corporation in English law, and established that the privacy of the corporation is not a concept which is alien to English law, but is protected to a limited extent – in broadcasting matters – by the Broadcasting Act 1996. It has also established that the traditional action does not provide protection against the misuse of the corporation's private information from dissemination or publication, nor does it provide protection against intrusion into the corporation's premises or property; that is to say, the traditional action does not protect the privacy of the corporation. In view of this limited protection, it becomes imperative at this juncture to outline the scope of the corporation's privacy which is still in need of protection in English law, and to which the research question is directed at.

***An outline of the scope of the corporation's privacy in need of protection in English law*** The question of the scope of the protection of the privacy of corporation is directed to, first, the *privacy of the corporation vs. public authorities* – such as where public authorities intrude into the premises of the corporation, as well as where public authorities interfere with the private information of the corporation;<sup>375</sup> secondly, it is directed to *the privacy of the corporation vs. the news press* – such as where

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<sup>374</sup> This is also in spite of the fact that the privacy of the corporation was also acknowledged by the Younger Committee in its report on privacy. It is suggested that this committee in its official enquiry into privacy, in making reference to the private information of a firm envisaged a firm asserting a right to privacy. See Younger Committee Report: *Report of the Committee on Privacy* Cmnd 5012, HMSO, 1972, 298.

<sup>375</sup> For instance, where a public authority hands corporation's information to the press who then publish the said information, or where public authority acts in a manner which suggests it intends to disseminate the said information, such as where it displays the said information before the press who then photograph it and publish.



newspapers or magazines surreptitiously intrude into the premises of the corporation, and/or publish corporation's private information in an exposé; and finally between *the privacy of the corporation vs. other corporations* – such as where one corporation through its agents surreptitiously intrude into the premises of another corporation, as well as where the said agents interfere with the private information of the other corporation.<sup>376</sup>

In the light of the above conclusion that the privacy of the corporation is protected to a limited extent by the Broadcasting Act 1996, in seeking to answer the research question of whether English law ought to be further developed to provide fuller protection for the privacy of corporations, the question is raised: how was the general protection of the privacy of the individual developed? This inquiry is made so as to see whether the corporation's privacy may be so developed. To this end, the general protection of the privacy of the individual was developed under the common law through the cause of action of the extended action for breach of confidence. An inquiry is made into the general protection of the privacy of the individual rather than the specific protections of the individual's privacy because as seen from the specific protections under statute, as examined in this chapter, they only advances a specific aspect of privacy protection for the individual. Moreover, even after the said specific protections had been established under statute, the common law was nevertheless developed under the extended action for breach of confidence to provide a more general protection for the individual's privacy.

Consequently, an investigation into whether the extended action for breach of confidence can and ought to be further developed to provide protection for the privacy of corporations in cases other than broadcasting matters, as outlined above, is the subject of the next chapter.

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<sup>376</sup> For instance, where the agents disseminate the said corporation's information.

## **CHAPTER 3**

### **PROTECTING THE PRIVACY OF THE CORPORATION – THE DEVELOPMENT OF THE EXTENDED ACTION FOR BREACH OF CONFIDENCE?**

#### **INTRODUCTION**

Having considered the level of protection of the privacy of corporations in English law, and found that the corporation's privacy is protected only to a limited extent, by the Broadcasting Act 1996; in view of the outline of the aspects of privacy which require protection, this chapter aims to investigate whether the extended action for breach of confidence can and ought to be further developed to provide fuller protection for the privacy of the corporation in English law. This investigation will be undertaken through doctrinal analysis – it will engage English courts' jurisprudence, Strasbourg court's jurisprudence, as well as the jurisprudence of the Court of Justice of the European Union where it concerns the administration of Article 8 ECHR.

This chapter is divided into two parts. In part 1, an examination of the extended action for breach of confidence upon which the question of whether the privacy of the corporation can and ought to be further developed therein is based, is undertaken. This examination is undertaken with the aim of understanding its development, nature and the extent of its protection. It specifically examines the incorporation of Article 8 and 10 of the European Convention on Human Rights 1950 [ECHR] into the domestic laws of the United Kingdom, and its consequent effect, which have been the horizontal application of the Human Rights Act 1998 [HRA], as well as the emergence of the cause of action of the misuse of private information, for the individual. The English courts' position on the extended action vis-à-vis the protection of the privacy of the corporation is also considered. This part concludes with an investigation of the position of the development of the intrusion privacy interest, and the possible development of an intrusion tort. Part 2 examines the Strasbourg court's interpretation of the notion and scope of Article 8 ECHR; it espouses the notion of private life, family life, home, and correspondence, and establishes that the jurisprudence of the European Court of Human Rights as well as the Court of Justice of the European Union have evolved from the protection of the individual's privacy under Article 8

ECHR, to the extension of Article 8 protection to the corporation's privacy – that is to say, its private life, home, and correspondence. In the light of this established position by the Strasbourg court, as strengthened by the Court of Justice of the European Union, this part argues that the extended action for breach of confidence ought to be further developed to provide protection for the privacy of the corporation in English law. This further development of the extended action for breach of confidence would satisfy the provisions of sections 2 and 6 HRA, it would also satisfy the provision of Article 13 ECHR. In addition, it would enable the corporation the autonomy to effectively carry out its activities, within the law.

The extended action for breach of confidence – common law – has been chosen for further development because contrary to the mediums of protection investigated in chapter 2 such as the Broadcasting Act 1996, Protection From Harassment Act 1997, and the Data Protection Act 1998, which provide for specific privacy protection, the extended action for breach of confidence is the medium which has been established for the general protection of the privacy of the individual. In view of the fact that the European Court of Human Rights is the final arbiter of human rights matters for Member States of the Council of Europe, the extended action has also been chosen because Articles 8 & 10 ECHR, which the English common law incorporated into the cause of action for breach of confidence to establish the extended action for breach of confidence, have been the basis for the protection of privacy of the corporation at the European Court of Human Rights.

Equally, an examination of Article 8 ECHR jurisprudence is made because the developments which have occurred in the protection of privacy at the Strasbourg level, from the protection of the individual to the protection of the corporation, culminate to serve as the process upon which the question of whether the extended action for breach of confidence ought to be further developed to provide protection for the privacy of the corporation, is decided; and also because Strasbourg jurisprudence has facilitated in shaping the English domestic law in matters relating to privacy. This examination is also made because section 2 Human Rights Act 1998 specifically provides that in determining a question which has arisen in connection with a Convention right, the United Kingdom Court must take into account the jurisprudence of the Strasbourg Court. In addition, the examination is made because as declared by Woolf LJ of the

Court of Appeal of the United Kingdom in *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885, 17, in difficult cases, it is perfectly appropriate to have regard to the jurisprudence of the European Court on Human Rights and the ECJ.

## **PART 1**

### **THE EXTENDED ACTION FOR BREACH OF CONFIDENCE**

#### **The incorporation of the ECHR into the domestic law of the United Kingdom and its effect**

The extended action for breach of confidence which protects against the violation of the privacy of the individual was established through the incorporation of Article 8 and Article 10 ECHR into the cause of action for breach of confidence, by virtue of the implementation of the HRA in the domestic law of the United Kingdom.

Article 8 provides

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.<sup>377</sup>

Article 10 provides

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

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<sup>377</sup> The right to privacy is provided for in the Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966, and in the Charter of the Fundamental Rights of the European Union 2000.

Article 12 of the Universal declaration states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

Article 17 of the International Covenant states that "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks".

Article 7 of the Charter states that "Everyone has the right to respect for his or her private and family life, home and communications".

As seen from the above, however, Article 8 ECHR is the most extensive, with subsection 2 serving as an additional guarantee to specifically ensure that public authorities do not exceed their mandate.

without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Before the coming into force of the HRA, the ECHR Article 8 rights of the individual to his private life, family life, home or correspondence was not directly applicable and did not have legally binding force in English domestic law. This is because the United Kingdom is a dualist state, thus a treaty is not directly effective upon ratification and therefore cannot automatically become part of the domestic legal system. In this case, a treaty has indirect effect because it requires the implementation of local legislation to incorporate it into local law so as to give effect to the treaty obligations. As a result of this, before the coming into force of the HRA, the ECHR only had limited relevance to the domestic law as a public international law instrument. This was illustrated in the case of *Malone v Metropolitan Police Commissioner*.<sup>378</sup> On the obligations imposed by the ECHR, Megarry V-C noted that Article 1 ECHR provides that ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms set out in Articles 2 – 18 of the European Convention’. His Lordship added that the United Kingdom, as a High Contracting Party which ratified the Convention on March 8, 1951, had as such long been under an obligation to secure these rights and freedoms to everyone. He declared

That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this country. All that I do is to hold that the

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<sup>378</sup> *Malone v Metropolitan Police Commissioner (No 2)* [1979] 2 All ER 620.

Convention does not, as a matter of English law, confer any direct rights on the plaintiff that he can enforce in the English courts.<sup>379</sup>

To this end, although the United Kingdom was a signatory to the ECHR, it was at the time accepted that there was no free-standing right of privacy in English law. On a free-standing right of privacy, Megarry V-C declared in *Malone v Metropolitan Police Commissioner*<sup>380</sup>

[There is an] absence of any English authority to this effect... it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing; the creation of an altogether new right is another... only Parliament can create such a right.<sup>381</sup>

Megarry V-C observed that it seemed that Parliament had abstained from legislating on a point that is plainly suitable for legislation, and in the circumstance, it was indeed difficult for the court to lay down new rules of common law or equity that would carry out the Crown's treaty obligations.

The absence of a free-standing right to privacy before the coming into force of the HRA meant that privacy cases were adjudicated upon through a host of laws at common law, such as defamation, malicious falsehood, trespass, breach of confidence; and under statute, the Broadcasting Act 1996, Protection from Harassment law 1997, Data Protection Act 1998. However, this range of laws did not adequately or exhaustively protect the individual's privacy, although the traditional breach of confidence came, *prima facie*, closest to doing so. The inadequacy of these laws to provide an effective remedy in cases involving the individual's privacy was profoundly illustrated in the case of *Kaye v Robertson*.<sup>382</sup> In this case, a well-known actor who was recovering in hospital, having undergone very extensive surgery due to severe head injuries sustained in a car accident, was interviewed by journalists who improperly gained access to his room contrary to notices placed against such entry. Photographs were also taken. The journalists subsequently announced that they intended to publish this interview. The plaintiff, through his next friend, sought an interlocutory injunction against this publication alleging trespass to person, passing

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<sup>379</sup> At 378.

<sup>380</sup> *Malone v Metropolitan Police Commissioner (No 2)* [1979] 2 All ER 620.

<sup>381</sup> At 372.

<sup>382</sup> *Kaye v Robertson* [1991] FSR 62.

off, libel and malicious falsehood. He claimed that he had not consented to the interview and had anyway not been in a fit state to consent.

An injunction against publication was granted, but subsequently discharged on appeal. At the Court of Appeal, it was held as follows: that there was no passing off as the plaintiff was not a trader; there was no libel; on the claim of battery, there was no evidence that damage had in fact been caused; that there was no actionable right of privacy in English law; and that the elements of a claim for malicious falsehood had been made out. Malicious falsehood was the only grounds upon which the Court of Appeal felt able to grant relief on the basis that Mr Kaye had a commercial interest in his first interview following his accident, and that the newspaper would misleadingly damage this commercial interest if it suggested to the public that Mr Kaye had given this interview voluntarily. The court did not therefore restrain publication of the interview, because it felt unable to do so; all it could do was restrain publication of the interview without a clear indication that it had been given involuntarily. The newspaper accordingly went ahead and published the interview, notwithstanding the fact that it had been obtained without Mr Kaye's consent.

In light of the apparent inadequacy in the law with regards to the protection of an individual's privacy, the Court of Appeal in arriving at its judgment was unanimous in its call for a legal right to privacy. Glidewell LJ in acknowledging the keen need for a right of privacy declared

It is well-known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals.<sup>383</sup>

Glidewell LJ noted that in the absence of such a right, the plaintiff had sought a remedy through other established rights of action.

Bingham LJ added

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<sup>383</sup> At 66.



This case nonetheless highlights, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens ... If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery... It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.<sup>384</sup>

Bingham LJ restated Professor Markesinis<sup>385</sup> position that although many aspects of privacy were protected by a host of existing torts, it however entailed fitting the facts of each privacy case into the pigeon-hole of an existing tort which may not only involve strained constructions; but often, may also leave a deserving plaintiff without a remedy.

Bingham LJ further observed, extra-judicially, in a subsequent article which he wrote with regard to the protection of privacy through a host of existing torts, in reference to the *Kaye* case,<sup>386</sup> that

...however effective these remedies may be in the cases to which they apply, there are other cases in which privacy is infringed and to which they do not apply, leaving the victim without a remedy.<sup>387</sup>

He went on to express his regret on the manner in which *Kaye* was handled, stating that the case 'served to illustrate the sort of situation in which the courts have held themselves to be unable to afford adequate relief to a plaintiff who plainly deserved it'.<sup>388</sup> To this end, he concluded

All three members of the court of whom I was one, regretted that in the absence of a law protecting privacy in this country they could afford Mr Kaye no more effective relief.<sup>389</sup>

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<sup>384</sup> At 70.

<sup>385</sup> Markesinis, B. *The German Law of Torts*. 2nd edn. Oxford: Clarendon Press, 1990, 316.

<sup>386</sup> Bingham, T. Should there be a Law to Protect Rights of Personal Privacy? *European Human Rights Law Review*. 1996: 5, 450-462.

<sup>387</sup> Ibid at 454. He spoke of the tort of harassment, trespass, defamation, and the breach of confidence.

<sup>388</sup> Ibid at 456.

<sup>389</sup> Ibid at 457.

Bingham LJ added that the basic human right to privacy is clearly enshrined in international treaties which the United Kingdom has bound itself to observe and although not directly effective, judges have nonetheless, on occasion, acknowledged the importance of the right to privacy.<sup>390</sup> It is noted that this article as well as *Kaye's* case were pre-HRA 1998.

It is interesting to note that in his post-HRA book,<sup>391</sup> Bingham LJ declared that he thought it likely that 'in years to come there would be some developments in the law of privacy, and that the recognition given by the Convention will encourage the courts to remedy what have been widely criticised as deficiencies in the existing law'.<sup>392</sup> He further propounded that the common law was advancing. However, when the opportunity arose for Bingham LJ, then at the House of Lords, to advance the law in line with his declarations, in the case of *Wainwright v Home Office*,<sup>393</sup> it is suggested that there was a reluctance to pioneer a much awaited judgment which would have charted the course for more protection for privacy. In this case, Bingham LJ instead completely agreed with Lord Hoffmann in dismissing an appeal from the Court of Appeal, which had overturned the decision of the County Court which had found the strip searching of the applicants to be an invasion of their privacy and an unjustified trespass to person. Bingham LJ dismissed the appeal on the reasons proffered by Lord Hoffmann. This is in spite of the fact that Lord Hoffmann heavily relied on *Kaye's* case, as well as on the findings of the pre-HRA Calcutt Committee<sup>394</sup> in arriving at his judgment. Relying on *Kaye's* case, Lord Hoffmann had declared that 'all three judgments in *Kaye's* case were flat against a judicial power to declare a right of privacy and he did not think that the judgments suggested that the courts should do so',<sup>395</sup> in so declaring, it is suggested, the House of Lords looked to a lower court which had regretted its decision for precedence. The *Wainwright* judgment was also

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<sup>390</sup> Ibid at 452-3.

<sup>391</sup> Bingham, T. *The Business of Judging*. Oxford: Oxford University Press, 2000.

<sup>392</sup> At 167.

<sup>393</sup> *Wainwright v Home Office* [2004] 2 AC 406. In this case the applicants were subjected to strip searching at a prison during a visit to their relation who was an inmate. This case is further examined in *the development of the intrusion interest of privacy* section below.

<sup>394</sup> Calcutt Committee Report: *Report of the Committee on Privacy and Related Matters*, Cmnd. 1102, HMSO, 1990. The Calcutt Committee recommended that a generalised tort of infringement of privacy should not be created.

<sup>395</sup> Para 26.

On the creation of a high-level principle of invasion of privacy, Lord Hoffmann stated 'the question must wait for another day'. Para 30.

held to be reached on the basis that the HRA should not apply in the present case in which events occurred before its coming into force. This position was however settled by the European Court of Human Rights which declared that *Wainwright* was a case that clearly fell within the scope of Article 8 of the Convention.<sup>396</sup>

The decision in *Kaye's* case was much criticised for showing a regrettable lack of boldness and inventiveness. Lester<sup>397</sup> suggested that Lord Bingham's statement that 'the invasion of Mr Kaye's privacy, however gross, does not entitle him to relief in English law', was too narrow a view of the judicial function of developing common law principles in accordance with contemporary and social needs, adding that the 'right to be let alone' was derived by the American jurists from the English common law.<sup>398</sup> Thompson<sup>399</sup> suggested that Kaye should have had available an action for breach of confidence in respect of the unauthorised photographs taken of him in the hospital, adding that there should be, in the light of this case, more judicial support for privacy. Eady<sup>400</sup> went further to call for the establishment of a statutory right of privacy, stating that the dangers in individual judges deciding such often controversial matters is that the decision may be drawn unnecessarily into issues of policy.

On the legislative front, considerable attention was given to the development of a law of privacy in the United Kingdom. In 1972, the Younger Committee<sup>401</sup> was constituted to inquire whether legislation was needed to give further protection to individuals, and also to commercial and industrial interests, against intrusion into their privacy. The committee considered that a general right of privacy should not be introduced into English law on the grounds that it may be used too readily to trespass upon the freedom to receive and use information, as well as express opinions. To this end, the

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<sup>396</sup> *Wainwright v United Kingdom* [2007] 44 EHRR 40. This case is discussed in the *development of the intrusion interest of privacy* section below.

<sup>397</sup> Lester, A. English Judges as Law Makers. *Public Law*. 1993: Sum, 269-290.

<sup>398</sup> See the early American case which relied on English Common law in arriving at its decision. *Union Pacific R Co v Botsford* [1891] 141 US 250.

<sup>399</sup> Thompson, M.P. More Judicial Support for Privacy. *Conveyancer and Property Lawyer*. 1995: Sept-Oct, 404-409.

<sup>400</sup> Eady, D. A Statutory Right to Privacy. *European Human Rights Law Review*. 1996: 3, 243-253.

<sup>401</sup> Younger Committee Report: *Report of the Committee on Privacy*, Cmnd. 5012, HMSO, 1972.

Committee decided by a majority against the creation of ‘a general tort of invasion of privacy’.<sup>402</sup>

Furthermore, in 1990, the Calcutt Committee<sup>403</sup> which was instituted to look into press behaviour with regards to personal privacy reached the conclusion that in the light of the absence of sufficient protection of individuals from press intrusion, a law of privacy was both justifiable and practicable. In spite of this conclusion however, the committee recommended that ‘an overwhelming case for the introduction of a statutory tort of infringement of privacy has not so far been made out’.<sup>404</sup> It reported that ‘such a tort should not at the time be introduced’.<sup>405</sup> The Committee recommended the establishment of a Press Complaints Commission.

In 1993, the Lord Chancellor on behalf of his department launched a consultation paper on the infringement of privacy, which recommended that a new civil remedy for an effective protection of privacy be created by Parliament.<sup>406</sup> It recommended a cause of action in tort, with respect to reckless, negligent, or intentional conduct tantamount to an infringement of privacy.

Furthermore, the House of Commons National Heritage Committee in its 4<sup>th</sup> Report<sup>407</sup> recommended that a ‘Protection of Privacy bill’ which provides protection for all citizens should immediately be introduced. However in 1995, the government in responding to the House of Commons National Heritage Select Committee expressed the conclusion that a case had not been made for introduction of a civil remedy for infringement of privacy.<sup>408</sup> It was suggested at the time that the government of the United Kingdom was not prepared to act so directly; thus, Britain was left with the Press Complaint Commission, and its ‘self-enforced’ Privacy Code.<sup>409</sup>

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<sup>402</sup> Para 659.

<sup>403</sup> Calcutt Committee Report: *Report of the Committee on Privacy and Related Matters*, Cmnd. 1102, HMSO, 1990.

<sup>404</sup> At para. 12.5.

<sup>405</sup> Ibid.

<sup>406</sup> Lord Chancellor’s Paper on *Infringement of Privacy*. July, 1993.

See also Markesinis, B. Our Patchy Law of Privacy: Time to do something about It. *Modern Law Review*. 1990: 53(6), 802-809.

<sup>407</sup> House of Commons National Heritage Committee Fourth Report on Privacy and Media Intrusion HC Papers 294 on *Privacy and Media Intrusion*, March 1993.

<sup>408</sup> Privacy and Media Intrusion: *The Government Response*. Cm 2918, 1995.

<sup>409</sup> Bingham, T. Should there be a Law to Protect Rights of Personal Privacy? *European Human Rights Law Review*. 1996: 5, 450-462.

The failure of an adequate protection for privacy in English law was highlighted as ‘one of the law’s ironies that although rooted in the English law of confidence, the American privacy torts had failed to germinate in England’.<sup>410</sup>

The position of the ECHR Article 8 rights not being directly applicable, and therefore not having binding force in English domestic law, however changed as a result of the implementation of the HRA. The HRA came into force in 2000 and serves as a constitutional measure designed to give the Convention rights full effect for the aims of the Act. This is expressed in the preamble of the HRA which states that it is ‘an act to give fuller effect to the rights and freedoms guaranteed under the ECHR’. The application of the ECHR and Strasbourg court’s jurisprudence in the domestic law of the United Kingdom was introduced in sections 2(1)(a), 3(1), and 6.

Section 2(1)(a) states that

A court or tribunal determining a question which arises in connection with a Convention right must take into account any – (a) judgment, decision, declaration or advisory opinion of the Court of Human Rights, whenever made or given, so far as, in the opinion of the Court or tribunal, it is relevant to the proceedings in which that question has arisen.

Section 3(1) states that

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Section 6(1) states that

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The combined effect of the foregoing provisions is that the domestic courts must take into account the jurisprudence of the ECHR in cases where the ECHR rights are

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<sup>410</sup> See generally Wacks, R. *Privacy and Press Freedom*. Blackstone: London, 1995, 48; see also Bingham, T. Should there be a Law to Protect Rights of Personal Privacy? *European Human Rights Law Review*. 1996: 5, 450-462, 451.

involved. Furthermore, it seeks to achieve compatibility of Convention rights with the domestic legislation as well as the common law of the United Kingdom; making it unlawful for a public authority, which includes a court or a tribunal, to act in a manner which is incompatible with the ECHR.

Although the recognition of human rights is not new to English law, and has an ancient history which dates back to such instruments as the Magna Carta<sup>411</sup> and the Bill of Rights,<sup>412</sup> the incorporation of the ECHR and its jurisprudence into United Kingdom domestic law has been significant and has been held to ‘transform the previously limited circumstances and degree to which the Convention had any relevance in domestic judicial proceedings, thereby revolutionizing the United Kingdom legal system’s whole approach in the protection of civil liberties and human rights’.<sup>413</sup> So significant are the developments brought about by the HRA that the Court of Appeal in the case of *A v B Plc*<sup>414</sup> called for only limited reference to be made to pre HRA cases.<sup>415</sup>

Indeed, by virtue of the incorporation of the ECHR into United Kingdom domestic law, the Article 8 right of an individual to his privacy has become recognised as part of the domestic laws of the United Kingdom, thereby providing further protection for privacy.<sup>416</sup> However, with the coming into force of the HRA, there has been contentious debate on whether there now exists a ‘right of privacy’ in English law. To this end, in one of the early post HRA cases, *Douglas v Hello! Ltd*,<sup>417</sup> Sedley LJ

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<sup>411</sup>The Magna Carta is an English charter originally issued by King John of England in 1215, a human rights instrument which became the founding document and basis for English citizens’ rights and liberties. His Lordship Lord Woolf indicated in a 2005 speech that the Magna Carta is first of a series of instruments that are now recognised as having special constitutional status. The others being the Petition of Rights 1628, Habeas Corpus Act 1679, Bill of Rights 1689, and Act of Settlement 1701. See “Magna Carta: A Precedent for Recent Constitutional Change”. *Judiciary of England and Wales Speeches*. 15 June, 2005.

<sup>412</sup> The Bill Of Rights is an Act of Parliament of England which lays down certain basic citizens’ rights such as freedom of speech, and was passed in 1689. These rights continue to apply today.

<sup>413</sup> Blackburn, R. and Polakiewicz, J. *Fundamental Rights in Europe*. Oxford: Oxford University Press, 2001, 960-961.

<sup>414</sup> *A v B Plc* [2003]QB 195.

<sup>415</sup> In interlocutory applications.

For a general discussion of the HRA see, Irvine, D. The impact of the Human Rights Act: Parliament, the Courts and the Executive. *Public Law*. 2003: Summ, 308 – 325; Steyn, J. 2000 - 2005: Laying the Foundations of Human Rights Law in the United Kingdom. *European Human Rights Law Review*. 2005: 4, 349 – 362.

<sup>416</sup> Although the intrusion aspect of privacy is still in the process of development. This is analysed in the ‘misuse of private information’ section below.

<sup>417</sup> *Douglas v Hello! Ltd* [2001] EMLR 9.

declared that English law had ‘reached a point in which it could be said with confidence that the law recognises and will appropriately protect a right to personal privacy’.<sup>418</sup>

Some scholars suggested that a right of privacy had emerged as a result of this incorporation of the ECHR into the domestic law of the United Kingdom. Singh and Strachan<sup>419</sup> stated that the issue of whether there existed a right to privacy was no longer an academic question in the light of Sedley LJ’s declaration, and further suggested that the decisions in *A v B Plc*<sup>420</sup> and *Campbell v Mirror Group Newspaper*<sup>421</sup> demonstrate a clear acknowledgement of the principle of a right of privacy for all individuals. However Lord Woolf CJ in the Court of Appeal case of *Wainwright v Home Office*<sup>422</sup> subsequently held that ‘a right of privacy did not exist at common law’;<sup>423</sup> this was further reinforced on appeal to the House of Lords<sup>424</sup> with Lord Hoffmann’s declaration that ‘English law did not recognise an omnibus tort of privacy and therefore reject the invitation to declare that a tort of privacy existed’;<sup>425</sup> thus reining in that position.<sup>426</sup>

More recently, however, the question of whether there is a right of privacy in English law, it is suggested, was settled by the Lord Chief Justice of England and Wales, Lord Judge, in Lord Neuberger’s Committee Reports Findings on Super-injunctions. His Lordship declared, *inter alia*, that

Before 2000 there was in England and Wales no general right to privacy and therefore no right to ... enforce any general claim to privacy.<sup>427</sup>

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<sup>418</sup> At 997.

<sup>419</sup> Singh, R. and Strachan, J. The Right to Privacy in English Law. *European Human Rights Law Review*. 2002: 2, 129 – 161, 161.

<sup>420</sup> *A v B Plc* [2003] QB 195.

<sup>421</sup> *Campbell v Mirror Group Newspaper* [2002] EMLR 30.

<sup>422</sup> *Wainwright v Home Office* [2002] 3 WLR 405.

<sup>423</sup> Para 40.

<sup>424</sup> *Wainwright v Home Office* [2004] 2 AC 406.

<sup>425</sup> Para 35. All the judges of the House of Lords in the case agreed with this position.

<sup>426</sup> This case is discussed in the ‘misuse of private information’ below.

<sup>427</sup> Lord Neuberger’s Committee Reports Findings on *Super-injunctions: Published findings on super-injunctions, anonymity injunctions and open justice*. 20<sup>th</sup> May 2011 @ <http://www.judiciary.gov.uk/media/media-releases/2011/committee-reports-findings-super-injunctions-20052011>. Accessed on 2/9/2012.

See also Lord Chief Justice of England and Wales (Lord Judge), and Master of Rolls (Lord Neuberger) Press Conference, 1. 20<sup>th</sup> May 2011 @

Furthermore, in the key findings and recommendations of the committee, the Master of Rolls, Lord Neuberger, reiterated this position, stating that

A general right to respect for privacy was not recognised until 2000.<sup>428</sup>

In accordance with these declarations, it is suggested that a right to privacy was recognised since 2000; furthermore, the potential to develop this right was established. Lord Judge noted that the development of this right since 2000 was an inevitable consequence of the incorporation of the ECHR, and in particular Article 8, into domestic law. He emphasized however that this right was not created at common law, but by Parliament, and the Courts' role is to apply the privacy law as created by Parliament through the HRA.

From the above, it is seen that the incorporation of the ECHR and by extension Article 8 provisions into the domestic law of the United Kingdom by virtue of the HRA has had the effect of developing the action for breach of confidence. It is submitted that this has occurred in two profound ways:

[A] in the horizontal application of the HRA by courts, which in the words of Sedley LJ in *Douglas v Hello! Ltd*<sup>429</sup> 'arguably gives the final impetus to the recognition of a right of privacy in English law'; and

[B] the emergence of the cause of action of the misuse of private information.

These are examined in turn. Furthermore, the position of the development of the intrusion interest of privacy and the possible development of an intrusion tort is also considered.

### **[A] The horizontal application of the HRA**

At the time of the incorporation of the ECHR into the domestic law of the United Kingdom by virtue of the HRA, it was debated whether the HRA would have only 'vertical effect' – to protect individuals' rights conferred by the Convention from the

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<http://www.judiciary.gov.uk/Resources/JCO/Documents/110520-superinjunctions-transcript.pdf>

Accessed on 24/10/2012.

<sup>428</sup> Lord Neuberger's Committee Reports Findings on *Super-injunctions: Published findings on super-injunctions, anonymity injunctions and open justice*. 20<sup>th</sup> May 2011, *ibid*.

<sup>429</sup> *Douglas v Hello! Ltd* [2001] EMLR 9, See para 111.



arbitrary interference of public authorities; or whether it would in addition have horizontal effect – to protect individuals’ rights conferred by the Convention from interference by other individuals, between themselves. Wade,<sup>430</sup> who is credited as the scholar that ignited this debate<sup>431</sup> suggested that the HRA would have horizontal effect. He contended that the manner in which the two limbs of Article 8 ECHR are expressed indicates clearly that it is capable of a much wider meaning, stating that the first limb states an unlimited right which is obviously intended for all comers; whilst the second limb prohibits public authorities from arbitrary interference except on specified grounds, hence specifically involving public authorities. However, he did not indicate whether the HRA would have indirect or direct horizontal effect.<sup>432</sup> In this regard, he asserted that there was no significance in distinguishing between direct and indirect effect, noting that ‘where a violation of a Convention right has occurred, the court would have no option but to obey section 6 HRA and enforce the right. Whether this is called direct or indirect effect seems to be a matter of words and makes no intelligible difference’.<sup>433</sup>

Conversely, it was also argued that the right created by Article 8 ECHR is a right not to be interfered with by a public authority, hence a vertically effective right only. The main proponent of this view is Buxton<sup>434</sup> who suggested that in the light of Article 8(2), the right was intended to apply to acts done by public and not private interests, hence a vertically effective right. Furthermore, that section 6 HRA limited a wider interpretation of the Convention by stating that it is unlawful for a ‘public authority’ to

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<sup>430</sup> Wade, H.W.R. Horizons of Horizontality. *Law Quarterly Review*. 2000: 116, 217-224.

<sup>431</sup> Arguably with scholars such as Hunt, M. The Horizontal Effect of the Human Rights Act. *Public Law*. 1998: Autumn, 423-443.

<sup>432</sup> ‘Indirect effect’ and ‘direct effect’ are terms borrowed from Community law. Community law is based on treaties. Consequently, where a treaty upon ratification requires the implementation or adoption of local legislation to give effect to treaty obligations, it is said to have ‘indirect effect’. This is known as the doctrine of consistent interpretation. This doctrine originated from the case of *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] Case 14/83 ECR 1891, in which the court stated that ‘it is for the national court to interpret and apply legislation adopted for the implementation of a directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law’. At para 28.

Conversely, where a treaty upon ratification applies to a legal system of a state without the state having to adopt any legislation specifically providing for the application of that treaty, the treaty is said to be ‘directly effective’ - hence direct effect.

See generally Hartley, T.C. *The Foundations of European Community Law*. 6<sup>th</sup> Edition. Oxford: Oxford University Press, 2007. See also Wade, H.W.R. Horizons of Horizontality. *Law Quarterly Review*. 2000: 116, 217-224.

<sup>433</sup> At 221-222.

<sup>434</sup> Buxton, R. The Human Rights and Private Law. *Law Quarterly Review*. 2000:116 January, 48-65.

act in a manner which is incompatible with a Convention right. As such, the HRA is to be vertically and not horizontally effective.

It has since been settled that a wider interpretation of Article 8 is in accordance with the spirit and culture of human rights, as reflected by the Strasbourg Court's jurisprudence; and by extension, the HRA is given a statutory impetus for horizontal effect by virtue of this fact in itself, in conjunction with the combined effect of sections 2(1), 3(1) and 6(1). The establishment of horizontal effect in the HRA by sections 2(1), 3(1) and 6(1) is realized on the basis that a court or tribunal, in determining a question which has arisen in connection with a Convention right according to section 2(1), *must* take into account the judgments, decisions, declaration, or advisory opinions which the European Court of Human Rights has made. Similarly, the reading of, and giving effect to primary or subordinate legislation in a manner which is compatible with Convention rights, according to section 3(1), or the requirement of public authority, including a Court or tribunal, to act in a manner that is compatible with the ECHR, according to section 6; would also entail regard not only between individuals and public authorities, but also between individuals.

This is illustrated in the case of *Venables v News Group Newspapers Ltd*<sup>435</sup> in which the court held that the combined effect of sections 2, and 6 imply horizontal effect because although the wording of section 6(1) suggests that the HRA specifically applies to public authorities, 'section 6(3) states that the court is a public authority, and in accordance with section 6(1) must itself act in a way compatible with the Convention; and in so doing, in accordance with section 2, have regard to the Strasbourg court's jurisprudence'.<sup>436</sup> In declaring the horizontal effect of the HRA, Butler-Sloss P stated

The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. There may, however, be positive obligations inherent in an effective "respect" for family life. Those obligations may involve the adoption of measures designed to secure respect for family life, even in the sphere of relations between individuals...<sup>437</sup>

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<sup>435</sup> *Venables v News Group Newspapers Ltd* [2001] EMLR 10.

<sup>436</sup> Para 25.

<sup>437</sup> *Ibid.*

Butler-Sloss P, in emphasising the positive obligation on the State to design measures to secure respect for family life, even in the sphere of relations between individuals, cited *Douglas v Hello! Ltd*<sup>438</sup> and further noted that Sedley LJ in *Douglas* stated that section 12(4) HRA

puts beyond question the direct applicability of at least one Article of the Convention as between one private party to litigation and another – in the jargon, its horizontal effect.<sup>439</sup>

Sedley LJ, in underlining the horizontal application of the HRA in *Douglas* observed

the two sources of law [common law and HRA which incorporates the ECHR into domestic law] now run in a single channel because, by virtue of section 2 and section 6 of the Act, the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights. This ... arguably gives the final impetus to the recognition of a right of privacy in English law.<sup>440</sup>

Sedley LJ concluded that since the coming into force of the HRA, the courts, in accordance with section 6(1) and (3), are required to ‘interpret and develop the common law, even where no public authority is a party to a litigation, and that approach must be informed by the jurisprudence of the Convention in respect of Article 8’.<sup>441</sup>

Therefore, for the courts to act in a manner which is compatible with the Convention rights, it had to develop the domestic law to be compatible with the Convention. With regards to privacy, the action for the breach of confidence would have to be developed in a manner which is compatible with Article 8 ECHR, whilst having due regard for Strasbourg court’s jurisprudence.

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<sup>438</sup> *Douglas v Hello! Ltd* [2001] EMLR 9, para 133.

<sup>439</sup> Para 26.

<sup>440</sup> Para 111.

<sup>441</sup> Para 166.

Equally, on the horizontal application of Article 8 ECHR, Lord Nicholls in *Campbell v Mirror Group Newspapers*<sup>442</sup> declared that

...the values enshrined in articles 8 and 10 [ECHR] are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.<sup>443</sup>

Likewise, Eady J in *Mosley v News Group Newspaper*<sup>444</sup> cited the Council of Europe Resolution 1165 of 1998 resolution, that

[T]he Assembly points out that the right to privacy afforded by article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.<sup>445</sup>

Indirect horizontal effect of the HRA has also been firmly recognised by the courts in the United Kingdom. This is achieved by extending the traditional breach of confidence action to accommodate Article 8 and 10 ECHR. In *Campbell v Mirror Group Newspaper*,<sup>446</sup> Lord Nicholls in reiterating Lord Woolf CJ in *A v B Plc*<sup>447</sup> declared

The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence ... the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action. Further, it should now be recognised that ... the values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body

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<sup>442</sup> *Campbell v Mirror Group Newspaper* [2004] 2 AC 457. This case is discussed in the next section – the tort of the misuse of private information – below.

<sup>443</sup> Para 17. This is reiterated by Eady J in *Mosley v News Group Newspaper* [2008] EWHC 1777, 9.

<sup>444</sup> *Mosley v News Group Newspaper* [2008] EWHC 1777.

<sup>445</sup> Para 12.

<sup>446</sup> *Campbell v Mirror Group Newspaper* [2004] 2 AC 457.

<sup>447</sup> *A v B Plc* [2003] QB 195, para 4.

such as a newspaper as they are in disputes between individuals and a public authority.<sup>448</sup>

The United Kingdom courts have therefore achieved the requirement of section 6(1) of the HRA by absorbing the Article 8 right into the jurisprudence of the action of breach of confidence, and resultantly, ‘have given new strength and breadth to the action so that it accommodates the requirement of those articles’.<sup>449</sup>

It was suggested by Hunt<sup>450</sup> that although the HRA may be horizontally applicable to a significant degree, a direct horizontal effect application is not intended by the HRA. Similarly, Pannick and Lester<sup>451</sup> suggested that it was clear that the Convention rights would exert a powerful influence beyond a direct vertical effect on public authorities under section 6, but did not envisage a direct horizontal effect of the HRA; instead, they envisaged Convention rights being approached through domestic law. This would be achieved by weaving the Convention rights into the fabric of domestic law – into principles of common law and equity. Thus, suggesting indirect horizontal effect on the premise that it would preserve the integrity of the domestic constitutional and legal

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<sup>448</sup> Para 17. See also Lord Hoffmann at para 46-52.

<sup>449</sup> Woolf CJ in *A v B Plc* [2003] QB 195, para 4.

Phillipson identified two versions of indirect horizontal effect: a weak, and a strong version. In the weak version, individuals may not sue each other directly for breach of constitutional rights. In this case, an individual aggrieved by the actions of another may not claim that the state has failed in protecting his right from infringement by another, as the individual has no such right against another. The claim here is that the courts apply and develop existing law in the light of the values represented by any applicable constitutional right; therefore the duty of the courts is to take account not of the rights themselves, but of the values represented by those rights. Conversely, the strong horizontal effect places an absolute duty on courts to ensure the compatibility of all existing law with the Convention, and unlike the weak version, the court’s must strive to ensure compatibility with the rights themselves, not merely the values.

See Phillipson, G. The Human Rights Act, Horizontal Effect and the Common Law: A Bang or a Whimper. *Modern Law Review*. 1999: 62(6), 824-849.

Aplin observed that although the courts have settled that the HRA has indirect horizontal effect, they have not elucidated whether the nature of that effect is ‘weak’ or ‘strong’; noting that in *A v B Plc* [2003] QB 195, para 4, Lord Woolf statement that *in seeking to be compatible with the Convention rights, courts absorbed the rights which Article 8 and 10 protect into the cause of action for breach of confidence*, arguably supported a ‘strong’ version of horizontal effect. Conversely, in *Campbell v Mirror Group Newspaper* [2004] 2 AC 457, para 17 Lord Nicholls observation that *the time had come to recognise the values enshrined in Article 8 and 10 as now part of the cause of action for breach of confidence*, arguably supported a ‘weak’ version of horizontal effect. Thus the exact nature of the indirect horizontal effect remains unclear.

See Aplin, T., Bently L, Johnson P, Malynicz, S. *Gurry on Breach of Confidence – The protection of Confidential Information*. 2<sup>nd</sup> edn. Oxford: Oxford University Press, 2012, 202 – 204.

<sup>450</sup> Hunt, M. The Horizontal Effect of the Human Rights Act. *Public Law*. 1998: Autumn, 423-443.

<sup>451</sup> Pannick, D. and Lester, A. The Impact of the Human Rights Act on Private Law: The Knight’s Move. *Law Quarterly Review*. 2000: 116 July, 380-385.

order, domesticating rather than alienating convention rights and promoting legal certainty.

There have, however, been particularly keen arguments by scholars<sup>452</sup> that a direct horizontal effect was applied in the case of *McKennitt v Ash*.<sup>453</sup> In this case, a close friend of a folk singer wrote a book divulging personal information about her. The claimant took objection and sued for breaches of privacy or obligations of confidence, seeking an injunction from further publication of private material.

At the High Court, Eady J found for the claimant and granted an injunction preventing further publication on the grounds that it constituted private information under Article 8 ECHR.

The Court of Appeal upheld this decision. In doing so, Buxton LJ acknowledged that there is no domestic tort of invasion of privacy,<sup>454</sup> therefore, in developing a right to protect private information the English courts had to proceed through the action of breach of confidence into which the jurisprudence of Articles 8 and 10 has to be shoehorned. In stating his discomfort with the accommodation of the jurisprudence of Articles 8 and 10 in the action of breach of confidence, he observed

That a feeling of discomfort arises from the action for breach of confidence being employed where there was no pre-existing relationship of confidence between the parties, but the “confidence” arose from the defendant having acquired by unlawful or surreptitious means information that he should have known he was not free to use.<sup>455</sup>

In approving Woolf CJ’s statement in *A v B Plc*<sup>456</sup> that the court complies with section 6 of the HRA by absorbing the rights which Articles 8 and 10 ECHR protect into the long-established action for breach of confidence, Buxton LJ declared that the effect of this argument was that

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<sup>452</sup> See Moreham, N. Privacy and Horizontality: Relegating the Common Law. *Law Quarterly Review*. 2007: 123, 373-378; Hughes, K. Horizontal Privacy. *Law Quarterly Review*. 2009: 125 April, 244-247. Bennett, T.D. Horizontality's new horizons - re-examining horizontal effect: Privacy, Defamation and the Human Rights Act: Part 1. *Entertainment Law Review*. 2010: 21(3), 96-104.

<sup>453</sup> *McKennitt v Ash* [2006] EMLR 10; [2008] QB 73.

<sup>454</sup> He cited Lord Hoffmann in *Wainwright v Home Office* [2004] 2 AC 406, para 35.

<sup>455</sup> Para 8.

<sup>456</sup> *A v B Plc* [2003] QB 195, para 4.

... in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but, as Lord Woolf CJ says, are the very content of the domestic tort that the English court has to enforce. Accordingly, in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? ... If “yes”, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10?<sup>457</sup>

It has been suggested that the Court of Appeal in so declaring, ‘gave the HRA direct horizontal effect by directly applying Article 8 and 10 to this case, thereby relegating the common law to a supporting role rather than providing the framework for the privacy action.’<sup>458</sup> This position seems to gain some weight considering the statement made by Eady J in *Mosley v News Group Newspaper*,<sup>459</sup> in which he affirmed

...a claim for invasion of privacy nowadays involves direct application of Convention values and of Strasbourg jurisprudence as part of English law...<sup>460</sup>

In the light of the above, it has been suggested that the Court of Appeal’s decision in the *McKennitt* case indicates a direct application of the right; and the final nail in the coffin for indirect horizontal effect may well be the *Mosley* case which continues this trend.<sup>461</sup>

It is, however, argued that a direct horizontal effect was not applied in the *McKennitt* case; rather, an indirect horizontal effect was applied. It will be recalled that Woolf CJ, in the Court of Appeal case of *A v B Plc*,<sup>462</sup> espoused the principle that in compliance with section 6 HRA, the rights protected by Articles 8 and 10 should be absorbed into the cause of action for breach of confidence as the very content of the domestic law. Accordingly, the common law was developed by the extension of the traditional action

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<sup>457</sup> Para 11.

<sup>458</sup> Moreham, N. Privacy and Horizontality: Relegating the Common Law. *Law Quarterly Review*. 2007: 123, 373-378, 375.

<sup>459</sup> *Mosley v News Group Newspaper* [2008] EWHC 1777.

<sup>460</sup> Para 196.

<sup>461</sup> Hughes, K. Horizontal Privacy. *Law Quarterly Review*. 2009: 125 April, 244-247.

<sup>462</sup> *A v B Plc* [2003] QB 195.

for breach of confidence to accommodate Articles 8 and 10 as the very content of the domestic law – thereby adequately protecting the individual’s privacy. This principle which brought about the establishment of the extended action for breach of confidence was what applied in the *McKennitt* case; hence, Articles 8 and 10 Convention rights were woven into the fabric of the domestic law, and approached therefrom – thereby bringing about indirect horizontal effect of the HRA. This approach has been firmly established in the domestic law of the United Kingdom.

These tensions nevertheless, the impact of the HRA of incorporating the ECHR and Strasbourg Court’s jurisprudence into English law, as well as its horizontal application have brought about the development of privacy law.

### **[B] The tort of the misuse of private information**

The second effect of the incorporation of the ECHR into the domestic law of the United Kingdom by virtue of the HRA, and the consequential influence of Article 8 and Strasbourg court’s jurisprudence, has been a significant revision of the status quo in English law regarding an individual’s private information. This has brought about the courts’ development of the cause of action for breach of confidence and the absorption into it of the rights protected by Articles 8 and 10 ECHR ‘as part of the Courts’ duty as a public authority to give horizontal effect to Convention rights’.<sup>463</sup> This development of the cause of action for breach of confidence by absorbing the rights protected by Articles 8 and 10 ECHR, as put forward by Lord Woolf CJ in *A v B Plc*,<sup>464</sup> brought about the extended action for breach of confidence which in turn has served as the foundation for the establishment of a privacy tort – the tort of the misuse of private information. The development of this tort was established in the case of *Campbell v Mirror Group Newspaper*,<sup>465</sup> considered below.

### **CAMPBELL v MIRROR GROUP NEWSPAPER**

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<sup>463</sup> See Patten J in *Murray v Express Newspapers Plc* [2009] Ch 481, para 18.

<sup>464</sup> *A v B Plc* [2003] QB 195.

<sup>465</sup> *Campbell v Mirror Group Newspaper* [2004] 2 AC 457.



In this case, Naomi Campbell, an internationally famous fashion model, complained that a newspaper published an article of her along with photographs showing that she was undergoing treatment at Narcotics Anonymous. She alleged that the newspaper obtaining and publishing additional details of her therapy at the group meetings and its taking of photographs covertly, constituted a breach of confidence in the light of Article 8 of ECHR. The defendant raised the defence of public interest stating that it was entitled, in the public interest, to publish the information in order to correct the claimant's misleading earlier public statement that she was not addicted to drugs.

In the court of first instance, Morland J gave judgment for the claimant and held, *inter alia*, that the information complained of was confidential and that having regard to section 12(4) HRA, and balancing Article 8 and 10 of the ECHR, the publication was not justified in the public interest.

On appeal, the Court of Appeal allowed the defendant's appeal and held that the disclosure of information that the claimant was receiving therapy from a self-help group could not be equated with disclosure of clinical details of medical treatment, and that since it was legitimate for the defendant to publish that the claimant was a drug addict who was receiving treatment, the disclosure of the additional information complained of was peripheral and not particularly significant. Therefore, the publication demonstrated that the claimant had deceived the public, and as such was justified in the public interest. Furthermore, the court held that a reasonable person of ordinary sensibilities would not find its disclosure offensive.

The claimant appealed to the House of Lords and the House allowed the appeal (Lord Nicholls and Lord Hoffmann dissenting) stating that the threshold test as to whether information was private was to ask: whether a reasonable person of ordinary sensibilities if placed in the same situation as the subject of disclosure, rather than its recipient, would find the disclosure offensive. Furthermore, that the details of the claimant's therapy for her drug addiction related to the condition of her physical and mental health, and the treatment she was receiving for it was akin to the private and confidential information contained in medical records; therefore, the assurance of privacy, confidentiality and anonymity were essential to the claimant treatment. The court added that the publication of such information required specific justification and in the instant case, the publication went beyond disclosure which was necessary to add

credibility to the legitimate story that the claimant had deceived the public; noting that although photographs of the claimant were taken in a public place, the context in which they were used and linked to the article added to the overall intrusion into the claimant's private life – which a person in the claimant's position would find disclosure highly offensive. The court declared that looking at the publication as a whole, and taking account of all the circumstances the claimant's right pursuant to Article 8 to respect for her private life outweighed the defendant's right pursuant to Article 10 freedom of expression; accordingly, publication of additional information and accompanying photographs constituted an unjustified infringement of the claimant's right to privacy for which she was entitled to damages.

In arriving at its judgment, the House of Lords referred to a host of Strasbourg cases,<sup>466</sup> and noted that the common law, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. Although dissenting, Lord Nicholls however noted a shift had occurred as a result of the implementation of the HRA

The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. Today this nomenclature is misleading. The breach of confidence label harks back to a time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature ... disclosed by one person to another in circumstances 'importing an obligation of confidence' ...<sup>467</sup>

Lord Nicholls in recognising the extended action for breach of confidence therefore declared that

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<sup>466</sup> The court referred to cases which were decided before the implementation of the Human Rights Act, as well as cases which were decided after the Human Rights Act, such as *Dudgeon v United Kingdom* [1981] 4 EHRR 149; *Observer and Guardian v United Kingdom* [1991] 14 EHRR 153; *Goodwin v United Kingdom* [1996] 22 EHRR 123; *Z v Finland* [1997] 25 EHRR 371; *Bladet Tromsø and Stensaa v Norway* [1999] 29 EHRR 125; *Fressoz and Roire v France* [1999] 31 EHRR 28; *Peck v United Kingdom* [2003] 36 EHRR 41.

<sup>467</sup> Para 13.

This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In so doing it has changed its nature ... Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.<sup>468</sup>

The action for the misuse of private information is referred to as a tort by Lord Nicholls as seen from the above declaration. This position is a development from the earlier position in *Douglas v Hello! Ltd*<sup>469</sup> in which the court viewed privacy from the perspective of 'a developing law of confidentiality; an equitable concept in which an equitable jurisdiction is exercised to restrain freedom of speech in circumstances where it would be unconscionable to publish private material'.<sup>470</sup> It is suggested that in the light of the development of the action for the misuse of private information, the question of whether the action is a tort was settled by the Master of Rolls, Lord Neuberger, in his report on super-injunctions in which he continually referred to the action as a tort.<sup>471</sup>

The misuse of private information tort affords protection for one aspect of the individual's privacy – the information privacy aspect. Lord Nicholls affirmed that the ECHR and Strasbourg jurisprudence have undoubtedly had a significant influence in this area of the common law. He noted that the provisions of Article 8 right to respect for private life, family life, home and correspondence, and corresponding Article 10 rights to freedom of expression have prompted English courts to identify more clearly the different factors involved in cases in which one or both of these two interests are

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<sup>468</sup> Para 14. This is reiterated in cases such as *McKennitt v Ash* [2008] QB 73, para 8; *Murray v Express Newspapers Plc* [2009] Ch 481, para 24.

<sup>469</sup> *Douglas v Hello! Ltd* [2001] EMLR 9.

<sup>470</sup> Para 65.

<sup>471</sup> Master of Rolls Report of the Committee on *Super-Injunctions: Super-Injunctions Anonymised Injunctions and Open Justice*. 20<sup>th</sup> May, 2011. Para 1.4., 1.20. @ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf> Accessed on 2/9/2012.

present; thereby testing the common law against the values encapsulated in these two Articles, consequently achieving harmony between the development of the common law and the Articles in question.

Therefore, Lord Nicholls declared

The time has come to recognise that the values enshrined in article 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: *A v B Plc* [2003] QB 195, 202, para 4.<sup>472</sup>

This principle of the recognition of Articles 8 and 10 ECHR as part of the cause of action for breach of confidence has brought about the development of this cause of action to incorporate Articles 8 and 10 as the very content of the domestic tort; consequently, delivering the establishment of the extended action for breach of confidence. The principle accords with the provision of Section 6(1) HRA and has been firmly established. This is illustrated in *McKennitt v Ash*<sup>473</sup> in which Buxton LJ noted that under section 6 HRA, the court, as a public authority, is required not to act in a manner which is incompatible with a Convention right; and the court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. On the effect of the foregoing, Buxton LJ declared

The effect of this guidance is, therefore, that in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but, as Lord Woolf CJ says, are the very content of the domestic tort that the English court has to enforce.<sup>474</sup>

Accordingly, in deciding the ambit of an individual's private life as guaranteed by Article 8, Lord Nicholls concluded

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<sup>472</sup> Para 17. See also Baroness Hale, para 132.

<sup>473</sup> *McKennitt v Ash* [2008] QB 73.

<sup>474</sup> Para 11. See also *Murray v Express Newspapers Plc* [2009] Ch 481, para 24; *Mosley v News Group Newspaper* [2008] EWHC 1777, para 9.

... courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.<sup>475</sup>

This was reiterated by Baroness Hale who further stated that the reasonable expectation of privacy is a threshold test which brings into play the balancing exercise between Articles 8 and 10.

The touchstone of reasonable expectation of privacy has been applied in privacy cases following these declarations. In *Murray v Express Newspapers Plc*,<sup>476</sup> Sir Anthony Clarke MR relying on *Campbell* stated that on a trial of a complaint of wrongful publication of private information, 'the first question is whether there is a reasonable expectation of privacy which is an objective question'.<sup>477</sup> On the question of what the reasonable expectation of privacy entails, Sir Anthony Clarke declared

As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.<sup>478</sup>

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<sup>475</sup> Para 21. See also *HRH Prince of Wales v Associated Newspaper Ltd* [2007] 3 WRL 222, para 88; *McKennitt v Ash* [2008] QB 73, para 11; *CTB v News Group Newspapers Ltd* [2011] EWHC 1232, para 23.

<sup>476</sup> *Murray v Express Newspapers Plc* [2009] Ch 481. In this case, photographs of the claimant's son being pushed in a pushchair in a public street were taken without his parents' consent, and through his parents as litigation friends the son complained that his right to respect to privacy under Article 8 ECHR had been breached, and that he had a reasonable expectation of privacy with regard to the photographs taken. In the court of first instance, it was held that the said complaint did not attract any reasonable expectation of privacy. On the claimant's appeal and on the question of the appropriate test of reasonable expectation of privacy, the Court of Appeal allowed the appeal, holding that the claimant had a reasonable expectation of privacy that engaged his Article 8 right.

<sup>477</sup> Para 35.

<sup>478</sup> Para 36.

Although Lord Nicholls judgment in *Campbell* above is a dissenting judgment, it is nevertheless submitted that the declarations therein firmly established principles which have become fundamental to the protection of privacy; such as the shift in the description of information from confidential to private, the recognition of the values enshrined in Article 8 and 10 as part of the cause of action for breach of confidence, and the establishment of a tort for the protection of an individual's private information – the tort of misuse of private information. These principles have also been the focus of scholarly writings which have contributed to the further development of privacy in English law.

Lord Hoffmann in his judgment in *Campbell*, although dissenting, espoused principles which have also been central to the development of privacy protection. To this end Lord Hoffmann stated that although the action for breach of confidence could be used to protect privacy in the sense of preserving the confidentiality of private information, as is seen in the early case of *Prince Albert v Strange*,<sup>479</sup> it was not founded on the notion that such information was in itself entitled to protection. He noted that the artificiality of breach of confidence in protecting privacy, on the basis that the action did not depend upon the personal nature of the information or extent to which such information was published, but upon whether a confidential relationship existed between the individual who imparted information and the individual who received it; and if there was a confidential relationship, then, equity imposed an obligation of confidentiality upon the latter individual and any other person who received the information with actual or constructive knowledge of the duty of confidence.

Lord Hoffmann therefore declared that in recent years, and with the influence of the HRA, there had been two developments in the law of confidence

One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as article 8 of the European Convention, of the privacy of personal information as something worthy of protection in its own right... The result of these developments has been a shift in the centre of gravity of the action for breach

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<sup>479</sup> *Prince Albert v Strange* [1849] 1 Mac & G 25, 41 ER 1171; [1849] 2 De G. & Sm. 652, 64 ER 293.

of confidence when it is used as a remedy for the unjustified publication of personal information.<sup>480</sup>

Lord Hoffmann concluded that the new approach takes a different view of the underlying value which the law protects. Instead of the misuse of private information being based on good faith applicable to confidential information, it focuses upon the protection of autonomy and human dignity – the right to control the dissemination of information about one’s private life.<sup>481</sup>

Lord Hope, in adding to Lord Hoffmann’s position on the development brought about by the incorporation of the ECHR into domestic law by the HRA, agreed with Lord Woolf’s declaration in *A v B Plc*<sup>482</sup> that Articles 8 and 10 give new breadth and strength to the action for breach of confidence, but however disagreed with Lord Hoffmann declaration that the result of the developments brought about by the HRA had been a shift in the centre of gravity.

It is argued that in the light of the horizontal application of the HRA which has brought about the accommodation of Articles 8 and 10 as the very content of the domestic tort, and the consequent emergence of the tort of misuse of private information in which the fundamental principle has shifted from whether information is confidential and imports an obligation of confidence, based on the duty of good faith and trust, to whether information is private, based on the protection of human dignity and autonomy; there has been a shift in the centre of gravity for the action of breach of confidence. Indeed, as declared by Lord Hoffmann, this development has brought about *the protection of privacy of private information as something worthy of protection in its own right*.

Furthermore, Lord Hope in his judgment declared that with regard to the general principle that a duty of confidence arises when confidential information ‘comes to the knowledge of a person where he has notice that information is confidential’, as espoused by Lord Goff in *AG v Guardian Newspapers Ltd*<sup>483</sup>

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<sup>480</sup> Para 46, 51.

<sup>481</sup> See also *Mosley v News Group Newspaper* [2008] EWHC 1777, para 214.

<sup>482</sup> *A v B Plc* [2003] QB 195, para 4.

<sup>483</sup> *AG V Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109, 282.

The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression.<sup>484</sup>

In looking to the European Court of Human Rights jurisprudence for guidance on the approach to be taken with regard to the two competing Convention rights of privacy and freedom of expression, Lord Hope indicated that a balancing exercise is involved; and that the context for this exercise is provided by Articles 8 and 10. To this end he declared

The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.<sup>485</sup>

This balancing exercise has firmly established, and has been demonstrated in *Mosley v News Group Newspaper*.<sup>486</sup> In this case, Eady J, in reference to *Campbell's* case declared that in a privacy matter, after the first hurdle of demonstrating a reasonable expectation of privacy has been satisfied, the court is required to carry out the next step of weighing the relevant competing Convention rights in the light of an intense focus upon the individual facts of the case.<sup>487</sup> In undertaking this balancing act, Eady J declared

It was expressly recognised that no one Convention right takes automatic precedence over another ... it has to be accepted that any rights of free expression, as protected by Art.10 ... must no longer be regarded as simply

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<sup>484</sup> Para 86.

<sup>485</sup> Para 105. See also *HRH Prince of Wales v Associated Newspaper Ltd* [2007] 3 WRL 222, para 89.

<sup>486</sup> *Mosley v News Group Newspaper* [2008] EWHC 1777; *CTB v News Group Newspapers Ltd* [2011] EWHC 1232, para 23.

<sup>487</sup> See also *McKennitt v Ash* [2008] QB 73, para 11.



‘trumping’ any privacy rights that may be established on the part of the claimant. Language of that kind is no longer used.<sup>488</sup>

In balancing these competing rights, due regard must be paid to proportionality.<sup>489</sup> Baroness Hale in *Campbell* stated that application of the proportionality test involved ‘first looking at the comparative importance of the actual rights being claimed in the individual case; and secondly, looking at the justifications for interfering with or restricting each of those rights’.<sup>490</sup>

From the above declarations, it is submitted that in the light of these changes, criteria such as whether information is of a *confidential quality*, or whether there exists an *obligation of confidence*,<sup>491</sup> or whether it was *in the public interest to maintain confidence*,<sup>492</sup> have been replaced with expressions such as whether the information is *private* and whether there is a *reasonable expectation of privacy*. There have also been such terminologies as *legitimate expectation of privacy*,<sup>493</sup> *highly offensive*,<sup>494</sup> and *obviously private*.<sup>495</sup> Indeed, in deciding the ambit of an individual's private life, as stated by Lord Nicholls and Baroness Hale in *Campbell*, the court needs to essentially apply the touchstone of private life which is *whether in respect of disclosed facts the individual in question had a reasonable expectation of privacy*. The reasonable expectation of privacy is ‘a threshold test’ which brings into play the balancing exercise which is thereafter undertaken between the individual’s interest under Article 8 in keeping information private, and the countervailing Article 10 interest of the

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<sup>488</sup> Para 10.

<sup>489</sup> See *HRH Prince of Wales v Associated Newspaper Ltd* [2007] 3 WRL 222; *CDE v MGN Ltd* [2010] EWHC 3308.

<sup>490</sup> Para 141.

<sup>491</sup> As required in *Coco v Clark (Engineers) Ltd* [1968] FSR 415, 419; see also *Saltman Engineering Co Ltd v Campbell* [1948] 65 RPC 203, 215.

<sup>492</sup> See *Re X (a minor)* [1975] Fam 47; *Woodward v Hutchins* [1977] 1 WLR 760.

<sup>493</sup> See *McKennitt v Ash* [2006] EMLR 10.

<sup>494</sup> See *Campbell v Mirror Group Newspaper* [2004] 2 AC 457.

<sup>495</sup> See *A v B Plc* [2003] QB 195.

recipient in publishing it.<sup>496</sup> This ‘new methodology’<sup>497</sup> is now firmly established and has been applied by the courts in a variety of cases as illustrated above.<sup>498</sup>

Accordingly, where information is private, the courts will inquire whether in the light of specific facts there is a reasonable expectation of privacy; and if so, the court will proceed to undertake a balancing act between the Article 8 rights of the claimant, and the Article 10 rights of the defendant; as such the *three requirement test* espoused by Megarry V-C in *Coco v Clark*<sup>499</sup> is no longer determinative of privacy matters. To this end, the focus in the cause of action of misuse of private information is on whether information is ‘private’ and if there is ‘a reasonable expectation of privacy’, as opposed to whether information is ‘confidential’ and if ‘an obligation of confidence’ arises.<sup>500</sup> This represents the most significant difference between the action of misuse of private information and the traditional action for the breach of confidence, that is to say, the focus on whether information is private, rather than on whether there is an obligation of confidence. As indicated by Eady J in *Mosley v News Group Newspaper*,<sup>501</sup> the law now offers protection to private information ‘in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship which gives rise to an enforceable obligation of confidence’.

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<sup>496</sup> Baroness Hale at para 137.

<sup>497</sup> That is to say, the new methodology of first demonstrating a reasonable expectation of privacy, and secondly, balancing Article 8 and 10 ECHR, in deciding the ambit of an individual’s private life.

<sup>498</sup> See *Mosley v News Group Newspaper* [2008] EWHC 1777, paras 10, 11, see also *CTB v News Group Newspapers Ltd* [2011] EWHC 1232, para 23.

<sup>499</sup> *Coco v Clark (Engineers) Ltd* [1968] FSR 415. The three requirements for a successful action are examined in chapter 2.

<sup>500</sup> See generally, Aplin, T. Development of the Action for Breach of Confidence in a Post HRA Era. *Intellectual Property Quarterly*. 2007: 1, 19-59; Aplin, T. Commercial Confidences after the Human Rights Act. *European Intellectual Property Review*. 2007: 29(10), 411-419; Carty, H. An analysis of the Modern Action for Breach of Commercial Confidence: When is Protection Merited? *Intellectual Property Quarterly*. 2008: 4, 416-455; Walsh, T., Greenwood, W. and Banks, D. *McNae’s Essential Law for Journalists*. 19<sup>th</sup> edn. Oxford: Oxford University Press, 2007; Fenwick, H. and Phillipson, G. *Media Freedom under the Human Rights Act*. Oxford: Oxford University Press, 2006; Aplin, T., Bently L, Johnson P, Malynicz, S. *Gurry on Breach of Confidence – The protection of Confidential Information*. 2<sup>nd</sup> edn. Oxford: Oxford University Press, 2012, chapter 6; Bennett, T.D. Horizontality’s New Horizons - Re-examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 1. *Entertainment Law Review*. 2010: 21(3), 96-104.

<sup>501</sup> *Mosley v News Group Newspaper* [2008] EWHC 1777, para 7.

Indeed, the effect of the incorporation of the ECHR into the domestic law of the United Kingdom has brought about the development of the tort of misuse of private information, thereby providing protection for the information privacy interest. This cause of action is established in relation to the protection of an individual's private information, and has presently not been developed to provide protection for the corporation's privacy.

A case which came close to dealing with the question of whether a corporation is entitled to privacy protection is the case of *Douglas v Hello!*<sup>502</sup> In this case, the first and second claimants, the Douglasses', paid the third claimants, *OK!* magazine, and gave it exclusive rights to publish photographs of their wedding. A rival magazine *Hello!* surreptitiously took photographs at the wedding which it subsequently published.<sup>503</sup> *Hello!* was held liable to the Douglasses' for a breach of confidence, and the Douglasses' equally recovered for an invasion of their privacy; while *Hello!* were held to be liable to *OK!* for a breach of confidence. In addition, Lord Hoffmann in the House of Lords stated that *OK!*'s case was not concerned with the protection of privacy but the commercial interest in the photographs which were taken at the wedding. Lord Hoffmann declared

But this appeal is not concerned with the protection of privacy. Whatever may have been the position of the Douglasses, who, as I mentioned, recovered damages for an invasion of their privacy, "OK!'s" claim is to protect commercially confidential information and nothing more ... "OK!" has no claim to privacy under article 8 nor can it make a claim which is parasitic upon the Douglasses' right to privacy.<sup>504</sup>

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<sup>502</sup> This case as reported as *OBG Ltd v Allan* [2008] 1 AC 1.

<sup>503</sup> At the High court, Lindsay J held that the defendants were liable to all the claimants for breach of confidence; furthermore, the Douglasses' recovered damages for an invasion of their privacy. On appeal by the defendants, the Court of Appeal dismissed the appeal against the first and second claimants on the grounds that the first and second claimants had made out a claim that the unauthorised photographs infringed their privacy, and reversed the Lindsay J's decision against *Hello!* on the ground that the obligation of confidence for the benefit of "OK!" attached only to the photographs which the Douglasses' authorised them to publish. The publication by *Hello!* may have invaded a residual right of privacy retained by the Douglasses' but did not infringe any right of *OK!*. The House of Lords upheld Lindsay J's judgment and stated that the third claimants were entitled to damages against the first defendant for breach of confidence.

<sup>504</sup> *OBG Ltd v Allan* [2008] 1 AC 1, para 118.

Therefore, although the information in question happened to have been about the private life of the Douglasses' who had contracted *OK!* for a job in relation to their private life; for *OK!*, the issue was about the commercial interest in the photographs which were taken at the wedding. As such, it is suggested that this case did not present a full opportunity for the courts to deliberate on the possibility of whether a corporation is entitled to privacy protection because it specifically concerned *OK!*'s commercial interest in the photographs which were taken at the wedding; thus commercial information of a confidential nature. Had it been that the occasion instead involved the Douglasses' as board members of *OK!*, carrying out the corporation's activities of a non-commercial nature – such corporation functions as the its end of year party, possibly held within the corporation's premises, then the question of whether a corporation is entitled to privacy protection, in the event of, for instance, press intrusion into the premises, would have provided ample opportunity. This would have been so on the basis of the intrusion by *Hello!* into *OK!*'s premises and *Hello!*'s subsequent publication of photographs taken.

This notwithstanding, it is observed, however, that the above statement of Lord Hoffmann does not exclude the possibility of privacy protection for corporations, but rather points to the fact that the appeal before the House of Lords for *OK!* was not concerned with the protection of privacy but with commercial information.

Another case which came close to dealing with the question of whether a corporation is entitled to privacy protection is the case of *Browne v Associated Newspaper Ltd*.<sup>505</sup> In this case for breach of confidence and/or misuse of private information, an injunction was granted to restrain the defendant from publishing information relating, *inter alia*, to business activities communicated in the course of a personal relationship by the claimant, an individual. On the above ground, this injunction was subsequently reversed by Eady J., and on appeal to the Court of Appeal, was dismissed.

In handing down the judgment of the Court of Appeal, Sir Anthony Clarke MR stated that 'although there is no authority to the effect that information relating to business activities communicated in the course of a personal relationship or learned in a

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<sup>505</sup> *Browne v Associated Newspaper Ltd* [2007] 3 WLR 289.

domestic environment would be characterized as private, it appears to us that it all depends upon the circumstances of each particular case'.<sup>506</sup> However, this proposition does not indicate whether a corporation is entitled to privacy protection under Article 8, and one wonders whether this may be assumed in the light of the fact that Sir Anthony Clarke MR cited, *inter alia*, *Societe Colas Est v France*,<sup>507</sup> which established the principle that a corporation is entitled to Article 8 rights to its private life and home, and thereafter made the declaration

In short, each case must be decided on its own facts ... without entering into a preliminary inquiry as to whether any particular piece of information should be allocated a “business” or a “personal” characterisation, the question to ask, in relation to each of the categories individually, was whether there was a reasonable expectation of privacy [and if so] article 8 is engaged.<sup>508</sup>

From the above, it is clear that the Court of Appeal indicated that information should not be characterized as business information or private information, but characterized on the basis of whether information has a reasonable expectation of privacy, and if so, then it may be protected by Article 8 ECHR. It is not clear however whether the court made this declaration as one specific to the case in question, which involved an individual; or whether it was a general declaration which would also include the protection of the information –business or private – of the corporation, in view of the reference to the *Societe Colas Est* case.

Similarly, in *Imerman v Tchenguiz*,<sup>509</sup> the claimant’s wife, through her brothers accessed the computer system of her husband, the claimant, Mr Imerman, and without his authorization copied information and documents which he had stored there, such as electronic copies of e-mails and other documents. In handing down the judgment of the Court of Appeal that, *inter alia*, Article 8 ECHR had been infringed, Lord Neuberger MR declared

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<sup>506</sup> Para 34.

<sup>507</sup> *Societe Colas Est v France* [2004] 39 EHRR 17; Sir Anthony Clarke at para 35.

<sup>508</sup> Para 36-37.

<sup>509</sup> *Imerman v Tchenguiz* [2011] Fam 116.

In this case, as far as we can see, there is no question but that Mr Imerman had an expectation of privacy in respect of the majority of his documents stored on the server... Many e-mails sent to and by and on behalf of Mr Imerman, whether connected with his family or private life, his personal and family assets, or his business dealings must be of a private and confidential nature.<sup>510</sup>

Lord Neuberger MR added

... the fact that the documents [confidential personal or business papers] were stored on the server, which was, as [Mr Imerman] knew, owned by Robert Tchenguiz [one of Mrs Imerman's brothers] who enjoyed physically unrestricted access to the server, cannot deprive Mr Imerman of the reasonable expectation of privacy, and the consequent right to maintain a claim for breach of confidence, in respect of the contents of any of his documents stored on the server.<sup>511</sup>

From the above, the Court of Appeal found that the claimant, Mr Imerman, had a reasonable expectation of privacy in accordance with Article 8 ECHR in respect of the majority of his documents accessed without his authorization; including documents connected with his business dealings, which the court classified to be documents of a private and confidential nature irrespective of the fact that it had been stored in an office. However, although the Court of Appeal established business information to be information of a private nature for which there was a reasonable expectation of privacy under Article 8, it made this declaration as specific to an individual, Mr Imerman, with regard to his business dealings; it however did not test the protection of the corporation in this regard.

Consequently, the above cases of *Browne v Associated Newspaper Ltd*<sup>512</sup> and *Imerman v Tchenguiz*<sup>513</sup> seem to suggest that in certain circumstances Article 8 ECHR may provide privacy protection for business information. However, this development is limited to the individual, and does not extend to the protection of the corporation's privacy interests.

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<sup>510</sup> Para 77.

<sup>511</sup> Para 79.

<sup>512</sup> *Browne v Associated Newspaper Ltd* [2007] 3 WLR 289.

<sup>513</sup> *Imerman v Tchenguiz* [2011] Fam 116.

## The development of an intrusion tort

Although the incorporation of the ECHR into the domestic law of the United Kingdom has brought about the development of the tort of misuse of private information which protects the information privacy interest, protection for the intrusion privacy interest of individuals as an independent cause of action is still in the process of development. Therefore, where the intrusion privacy interest of an individual is breached, without more, a claimant may not be able to claim an infringement of a right privacy.<sup>514</sup> Rather, the claimant may have to recover through a claim under legislation such as, for example, Protection from Harassment Act 1997, the Data Protection Act 1998; or through a common law claim such as trespass, or nuisance. Presently, as the position on the protection of the intrusion privacy interest evolves, there are two conflicting positions as to what the law is.

The first position, it is suggested, is that the law currently considers the intrusion aspect of privacy merely a factor among others for the determination of whether there has been a misuse of private information. This is illustrated in *Murray v Express Newspapers Plc*,<sup>515</sup> in which photographs of the claimant's son being pushed in a pushchair in a public street were taken without his parents' consent, and through his parents, as litigation friends, the son complained that his right to respect to privacy under Article 8 ECHR had been breached, and that he had a reasonable expectation of privacy with regard to the photographs taken.

The Court of Appeal held that the claimant had a reasonable expectation of privacy that engaged his Article 8 rights.

In arriving at its judgment, the court stated that in the course of investigating whether there is a reasonable expectation of privacy, one of the factors it will consider is 'the nature and purpose of the intrusion'.<sup>516</sup> Thus, in seeking to answer the question of whether there is a reasonable expectation of privacy, the intrusive manner of targeting the claimant and surreptitiously obtaining the photographs will have a direct bearing on the decision of the court. This suggests that the court will engage intrusion not as an

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<sup>514</sup> *Wainwright v Home Office* [2004] 2 AC 406. In this case, applicants who had been subject to a strip search of an extreme nature could not seek a remedy under privacy for the intrusive nature of the search; rather they sought relief under trespass and battery, common law remedies known to the law of the United Kingdom. This case is examined below.

<sup>515</sup> *Murray v Express Newspapers Plc* [2009] Ch 481.

<sup>516</sup> Sir Clarke MR at para 36.

independent cause of action, but as a stepping stone – a factor – for the determination of a privacy action.<sup>517</sup>

Furthermore, the court stated that the photographs in question

...were taken deliberately, in secret and with a view to their subsequent publication.<sup>518</sup>

In addition, the court reasoned that

It may well be that the mere taking of a photograph of a child in a public place when out with his or her parents, whether they are famous or not, would not engage article 8 of the Convention... [In the present case] it was the clandestine taking and subsequent publication of the photograph in the context of a series of photographs ...<sup>519</sup>

It is submitted that from the above comments, the court's view was that Article 8 ECHR may not have been engaged on the mere basis of the deliberate and clandestine taking of a photograph, without more – that is to say the intrusion privacy interest; but would be engaged, as seen in the present case, on the basis of the deliberate and clandestine taking of the photographs in corroboration with its subsequent publication – that is to say the information privacy interest.

Professor Aplin<sup>520</sup> indicated that from the two above statements of the Court of Appeal, two different ways in which clandestine photography may give rise to privacy claims under Article 8 are revealed. First, covert photography may engage Article 8 where there is surveillance of a person or where distress is caused; thus an *intrusion* caused by surreptitious photography. Secondly, where the photograph is deliberately taken with a view to publication for profit, knowing that the individual shown is likely to object, a reasonable expectation of privacy which would engage Article 8 may be established. Professor Aplin adds that this second way is ostensibly linked to publication. In addition, it is suggested, as stated in chapter 1, that where the photographs are surreptitiously taken with a view to publication, until they are actually

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<sup>517</sup> For a discussion on this issue, see Warby, M., Moreham, N. and Christie, I. (eds) *The Law of Privacy and the Media*. Oxford: Oxford University Press, 2011, chapter 10.

<sup>518</sup> Para 50.

<sup>519</sup> Para 17.

<sup>520</sup> Aplin, T., Bently L, Johnson P, Malynicz, S. *Gurry on Breach of Confidence – The protection of Confidential Information*. 2<sup>nd</sup> edn. Oxford: Oxford University Press, 2012, 283.



published, it is the intrusion privacy interest which is engaged; the information privacy interest is engaged from the point of publication onwards.

The position of the intrusion privacy interest as a stepping stone for the determination of a misuse of private information action was illustrated in *Campbell v MGN Ltd*<sup>521</sup> in which the court, in seeking to determine whether Campbell's Article 8 rights had been violated declared

Lord Hope declared that

[The photographs] were taken deliberately, in secret and with a view to their publication in conjunction with the article... the photographs were published and her privacy was invaded.<sup>522</sup>

Thus, the intrusive manner in which the photographs were taken – deliberately and in secret – served as a stepping stone upon which Lord Hope was led to find that the *publication* of the said photographs by the defendant had breached the claimant's privacy. The fact that photographs were taken surreptitiously was an important consideration, but merely a consideration.

The second position regarding the intrusion privacy interest is that some courts have envisaged the possibility of the intrusion interest as a cause of action independent of the misuse of private information. This is illustrated in the case of *Mosley v News Group Newspapers Ltd*<sup>523</sup> in which a well-known personality complained of an infringement of his privacy where the press, without his consent, published information that he engaged in certain sexual acts with prostitutes; the court held that the complainant was entitled to the protection of Article 8.

Although the claim in this case was confined to the publication of information and did not include the intrusive means by which the information was obtained, Eady J in his judgement indicated that

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<sup>521</sup> *Campbell v Mirror Group Newspaper* [2004] 2 AC 457, discussed in the previous section above.

<sup>522</sup> Para 123.

<sup>523</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777.

Naturally, the very fact of clandestine recording may be regarded as an intrusion and an unacceptable infringement of Art. 8 rights.<sup>524</sup>

In so stating, it is suggested that the court envisaged the said intrusion as one which could in itself, without more, engage Article 8 ECHR.

Similarly, the courts have proceeded to hold that the circumstances in which a photograph is taken in a public place may by itself turn the event into one in which Article 8 ECHR is not merely engaged but grossly violated. This was illustrated in *Wood v Commissioner for Police of the Metropolis*.<sup>525</sup> In this case, the claimant sought judicial review by way of declaration that the police actions of surveillance on him and the taking of his photographs were in violation of his Article 8 rights. The court held that the taking and retention of photographs of the claimant in the street violated the claimant's Article 8 rights.

In arriving at his judgment, Lord Laws declared

The act of taking the picture, or more likely pictures, may be intrusive or even violent, conducted by means of hot pursuit, face-to-face confrontation, pushing, shoving, bright lights, barging into the affected person's home. The subject of the photographer's interest ... may be seriously harassed and perhaps assaulted. He or she may certainly feel frightened and distressed. Conduct of this kind is simply brutal ... It would plainly violate Article 8(1).<sup>526</sup>

The protection of privacy involves much more than the protection of private information. Intrusion is a recognised legal value in England as suggested by the declarations of Eady J in *Mosley's* case, and Lord Laws LJ in *Wood's* case above. This legal value was also illustrated in *Campbell v MGN Ltd*,<sup>527</sup> in which Lord Nicholls stated that 'the wrongful disclosure of private information is just one aspect of invasion of privacy, and an individual's privacy can be invaded in ways not involving publication of information'.<sup>528</sup>

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<sup>524</sup> Para 17.

<sup>525</sup> *Wood v Commissioner for Police of the Metropolis* [2009]4 All ER 951.

<sup>526</sup> Para 34.

<sup>527</sup> *Campbell v Mirror Group Newspaper* [2004] 2 AC 457.

<sup>528</sup> *Campbell v Mirror Group Newspaper* [2004] 2 AC 457, paras 12 and 15.

However, there are tensions in the recognition of the intrusion aspect of privacy, as is illustrated by the judgment of the House of Lords in *Wainwright v Home Office*.<sup>529</sup> In this case, the applicants were subject to strip searches at a prison during a visit to their relation who was an inmate. The applicants were shaken by the extreme nature of the searches and subsequently filed a civil action against the Home office. This application was successful and the applicants were awarded damages following a finding of trespass. Furthermore, the County Court held, *inter alia*, that the strip-searching was an invasion of their privacy exceeding what was necessary and proportionate, and thus constituted an unjustified trespass to person.

This decision was overturned by the Court of Appeal which disagreed that trespass to the person could be extended to fit the circumstances of the case, and found that no wrongful act, save for the battery against the second applicant, had been committed.

The House of Lords upheld the judgment of the Court of Appeal. Lord Hoffmann noted that the events in the case took place before the coming into force of the HRA; as such, the HRA could not affect the outcome. In the course of its judgment, Lord Hoffmann cited with approval Sir Robert Megarry V-C declaration in *Malone v Metropolitan Police Commissioner*<sup>530</sup> that

... it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another ... I readily accept that if the question before me were one of construing a statute enacted with the purpose of giving effect to obligations imposed by the Convention, the court would readily seek to construe the legislation in a way that would effectuate the Convention rather than frustrate it. However, no relevant legislation of that sort is in existence.<sup>531</sup>

Lord Hoffmann relied on this passage in spite of the fact that the HRA had come into force, and the power of sections 2 and 6 gave the courts an opportunity to develop the law. This is also in spite of the fact that he acknowledged that intrusion upon a plaintiff's space or his private affairs' was relevant in *Wainwright*. It is argued that the situation in *Wainwright* was quite different from the *Malone* case. *Malone* was heard at

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<sup>529</sup> *Wainwright v Home Office* [2002] 3 WLR 405; [2004] 2 AC 406.

<sup>530</sup> *Malone v Metropolitan Police Commissioner* (No 2) [1979] 2 All ER 620, 372, 379.

<sup>531</sup> Paras 19, 20.

a time when the HRA had not come into force, and as such, Sir Robert Megarry V-C's position that he could not construe a statute enacted with the purpose of giving effect to obligations imposed by the Convention, accorded with the time because at the said time, no relevant legislation of the sort was in existence. In any case, Sir Robert Megarry V-C indicated that if such legislation existed, the court would readily seek to construe it in a manner which would effectuate the Convention. Conversely, although the events in *Wainwright's* case occurred before the coming of the HRA, the case was heard at a time when the HRA was in force, thus the above declaration of Sir Robert ought not to have been applied. This is because by virtue of section 6 HRA, the Courts are mandated to adjudicate cases concerning Convention rights in a manner which is compatible with the Convention. For the adjudication to be compatible with the Convention with regard to Article 8 ECHR, it is submitted that in the present case, the intrusion aspects of Article 8 ought to have been recognised as part of the protection of privacy rather than seeking to harness the tort of intentionally inflicting harm, trespass or battery to serve as a remedy.

The House of Lords also relied, as already observed above,<sup>532</sup> on the Court of Appeal case of *Kaye* which Bingham LJ had declared 'highlighted, yet again, the failure of both the common law of England and statute to protect in an effective way the personal privacy of individual citizens',<sup>533</sup> and for which Lord Bingham LJ, extra judicially, indicated that 'all three members of the court of whom I was one, regretted that in the absence of a law protecting privacy in this country we could afford Mr Kaye no more effective relief'.<sup>534</sup>

Furthermore, as already observed above,<sup>535</sup> the Court also relied on the recommendations of the Calcutt Committee.<sup>536</sup>

That intrusion is an aspect of privacy which engages Article 8 ECHR was subsequently settled by the European Court of Human Rights in *Wainwright v United*

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<sup>532</sup> In *Kaye v Robertson* [1991] FSR 62.

<sup>533</sup> *Kaye v Robertson* [1991] FSR 62, 70.

<sup>534</sup> Bingham, T. Should there be a Law to Protect Rights of Personal Privacy? *European Human Rights Law Review*. 1996: 5, 450-462, 457.

<sup>535</sup> Discussed in *Kaye v Robertson* [1991] FSR 62 above, with further reference.

<sup>536</sup> Calcutt Committee Report: *Report of the Committee on Privacy and Related Matters*, Cmnd. 1102, 1990, para 12.5.

*Kingdom*.<sup>537</sup> This Court declared that this case clearly fell within the scope of Article 8.

In arriving at this judgment, the European Court of Human Rights indicated that Article 13 ECHR requires an effective remedy in domestic law in respect of violations of the rights and freedoms set forth in the ECHR. To this end the court stated

Where an applicant has an arguable claim to a violation of a Convention right ... the domestic regime must afford an effective remedy.<sup>538</sup>

The court noted that the issue which it must address was whether the applicants had a remedy at national level to ‘enforce the substance of the Convention rights in whatever form they may happen to be secured in the domestic legal order’,<sup>539</sup> to which it declared that they had not, and thus there had been a violation of Article 13.

In concluding, the European Court of Human Rights stated that due to the manner in which the searches were carried out on the applicants, it was not satisfied that the searches were proportionate to the legitimate aim pursued. The Court found that the searches could not be regarded as ‘necessary in a democratic society’ within the meaning of Article 8(2) of the Convention.<sup>540</sup> Accordingly, the court unanimously held that there had been a violation of Article 8.

It is submitted that the outcome in the case of *Wainwright v United Kingdom*, as well as the declarations of Lord Nicholls in *Campbell’s* case, Eady J in *Mosley’s* case and Lord Laws LJ in *Wood’s* case above, provide further opportunities for the development of independent protection for the intrusion aspect of privacy; that is to say, the development of a specific intrusion tort. These declarations and interpretations of the scope of privacy by their Lordships are consistent with the Strasbourg Court’s interpretation of private life under Article 8, and for the United Kingdom to fulfil its positive obligation under the Convention to efficiently protect all aspects of Article 8 and also satisfy Article 13 ECHR, ‘privacy protection will certainly have to extend beyond the protection of private information’.<sup>541</sup> Likewise, the protection of all aspects

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<sup>537</sup> *Wainwright v United Kingdom* [2007] 44 EHRR 40.

<sup>538</sup> Para 53.

<sup>539</sup> Para 54.

<sup>540</sup> Para 49.

<sup>541</sup> See also Moreham, N. in Warby, M., Moreham, N. and Christie, I. (eds) *The Law of Privacy and the Media*. Oxford: Oxford University Press, 2011, 467.

of privacy – the information privacy interest and the intrusion privacy interest – would be consistent with section 6 HRA which makes it unlawful for a court to act in a manner which is not compatible with Convention rights. However, as English law presently stands, the intrusion interest of privacy is yet to develop into an independent tort, and is protected through a range of laws under statute and common law.

It is further submitted that on the basis of the HRA, Parliament has provided the groundwork with which a tort of intrusion may be developed by the courts. It is proposed that an intrusion tort may be developed in the same manner as it has been developed in New Zealand. This development occurred by virtue of the case of *C v Holland*<sup>542</sup> in which the plaintiff instituted an action for invasion of privacy against the defendant on discovering that he had surreptitiously videoed her when she was taking a bath, and stored the video on his computer.<sup>543</sup>

In establishing ‘a tort of intrusion upon seclusion’ as part of New Zealand law,<sup>544</sup> Whata J considered that in *Hosking v Runting*,<sup>545</sup> the Court of Appeal confirmed the existence of the privacy tort of wrongful publication of private facts subject to the fundamental requirements that first, there must exist facts in respect of which there is a reasonable expectation of privacy; and secondly, publicity must be given to those private facts which would be considered highly offensive to an objective reasonable person. Accordingly, Whata J declared that the time had come for the above principles in *Hosking’s* case which are sufficiently proximate to enable an intrusion tort, to be seen as a logical extension or adjunct to it. Thus, it was functionally appropriate to establish a tort of intrusion into seclusion, to the end that privacy protection may be afforded an individual where there has been no publicity on an infringement which is highly offensive, and in which a reasonable expectation of privacy is entitled.

Whata J set out the elements of the tort, asserting that in order to establish a claim based on the tort of intrusion upon seclusion, a plaintiff must show an intentional and unauthorised intrusion, into seclusion, involving infringement of a reasonable

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<sup>542</sup> *C v Holland* [2012] NZHC 2155.

<sup>543</sup> The court held that the defendant was liable for intrusion into the solitude and seclusion of the plaintiff which had infringed the reasonable expectation of privacy of the plaintiff, and that the intrusion was highly offensive.

<sup>544</sup> Para 93, 98.

<sup>545</sup> *Hosking v Runting* [2005] 1 NZLR 1.

expectation of privacy; which is highly offensive to a reasonable person.<sup>546</sup> This conclusion was reached on the basis of six observations:

First, on the basis that freedom from intrusion into personal affairs is a recognised value in New Zealand.<sup>547</sup>

Secondly, that freedom from intrusion into personal affairs is agreeable to accustomed justified limitations, including a defence of legitimate public concern based on freedom of expression.

Thirdly, that a tort of intrusion upon seclusion is absolutely compatible with, and a logical adjunct to, the Hosking tort of wrongful publication of private facts; furthermore, both torts logically attack the same underlying wrong, namely, unwanted intrusion into a reasonable expectation of privacy.

Fourthly, that the right to freedom of expression affirmed by section 14 New Zealand Bill of Rights Act 1990 as well as freedom of speech values are only infringed when publication is also contemplated, and where this occurs, the Hosking principles apply.

Fifthly, that there are clear similarities between the structure of an intrusion tort and traditional torts based on the protection of person and property; furthermore, both intrusion tort and traditional torts involve unwanted acts which cause harm or damage to a person, or a person's possession.

And finally, that a feature of the common law is its capacity to adapt to vindicate rights in light of a changing social context.<sup>548</sup>

In the same vein, it is proposed that an intrusion tort may be developed in like manner as illustrated in the above case. Intrusion is a recognised legal value in the legislation of the United Kingdom by virtue of the Regulation of Investigatory Powers Act 2000;<sup>549</sup> and it may be suggested, under common law, by the *Campbell* case, the *Mosley* case, and the *Wood* case. Secondly, freedom from intrusion into private affairs

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<sup>546</sup> Para 94.

<sup>547</sup> Whata J referred to Principle 3 of the New Zealand Broadcasting Standards Authority 1999, which adopts the American intrusion principle in its Restatement (Second) of Torts 1977 at § 652B and recognises claims of intrusion; and Section 21 New Zealand Bill of Rights Act 1990 which confers a right to be secure against unreasonable search and seizure.

<sup>548</sup> See generally, para 75.

<sup>549</sup> Section 32 provides for authorization for the carrying out of intrusive surveillance by public authority.

as part of the guarantee of Article 8 ECHR would engage a defence of legitimate public interest based on freedom of expression as provided for under Article 10 ECHR, much in the same manner as the tort of misuse of private information. Thirdly, an intrusion tort is entirely compatible with, and a logical adjunct to, the tort of misuse of private information established in the *Campbell* case. Indeed, this is recognised by Lord Nicholls above declaration in *Campbell* that there is more to the invasion of privacy than the wrongful disclosure or publication of private information; both privacy interests protect the same principle, namely, a reasonable expectation of privacy.<sup>550</sup> Fourthly, freedom of speech values and the right to freedom of expression affirmed by Article 10 ECHR are only infringed when publication is contemplated, in which case the misuse of private information principle of a reasonable expectation of privacy, as seen in *Campbell*, would apply. Fifthly, there are clear similarities between the structure of an intrusion tort and traditional torts on the basis of protection of property and the person, in relation to unwanted acts that cause harm or damage to a person's possession, or to the person. And finally, it is trite that a feature of the common law is its capacity to renew itself, and adapt to vindicate rights in light of a changing social context.

It may be suggested that trespass ought to be used to protect privacy. However, it becomes debatable whether in the light of technological advances, trespass would sufficiently protect infringements that may arise in such cases as surveillance in a public place by CCTV, or zoom lens photograph technology. The development of an intrusion tort would be consistent with the Strasbourg Court's interpretation of private life under Article 8, it would also be consistent with section 6 HRA; this development would enable the United Kingdom to meet its positive obligation under the Convention to protect all aspects of Article 8 effectively, and likewise satisfy Article 13 ECHR.

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<sup>550</sup> This is recognised in another common law jurisdiction. For instance, in the Canadian case of *Jones v Tsige* [2012] ONCA 32, para 66, the court, in recognising the fundamental value of privacy declared that *informational privacy* closely tracks the same interests protected by an intrusion tort.



## **PART 2**

### **THE SCOPE OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE DEVELOPMENT OF ENGLISH LAW**

This part examines the European Court of Human Rights interpretation of the notion and scope of Article 8 ECHR; it espouses the notion of private life, family life, home, and correspondence, and establishes that the jurisprudence of the European Court of Human Rights as well as the Court of Justice of the European Union have evolved from the protection of the individual's privacy under Article 8 ECHR, to the extension of Article 8 protection to the corporation's privacy – that is to say, its private life, home, and correspondence. In the light of this evolved position, it is submitted that the extended action for breach of confidence can and ought to be further developed to provide protection for the privacy of the corporation in English law; it is argued that this extension would aim to satisfy the provisions of Article 13 ECHR, as well as sections 2 and 6 HRA.

Article 8 stipulates

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

#### *Objective of Article 8*

The original objective of Article 8 is essentially one of protecting the individual against arbitrary interference by public authorities, which is primarily a negative undertaking.<sup>551</sup> There is equally an integral positive obligation which involves the adoption of measures designed to secure respect for private life even in the sphere of

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<sup>551</sup> *Belgian Linguistic Case* [1979-80] 1 EHRR 252, para 7; *Niemietz v Germany* [1993] 16 EHRR 97 para 31.

the relations of individuals between themselves.<sup>552</sup> It is suggested that in the light of the principle established in *Societe Colas Est v France*,<sup>553</sup> the objective of Article 8 is also one of protecting the corporation against arbitrary interference by public authorities. Equally, there is, arguably, also a positive obligation which involves adopting measures designed to secure respect for the private life in the sphere of relations of corporations. It is noted that the boundaries between the state's positive and negative obligations under Article 8 are not precisely defined, though the applicable principles are similar; and in the exercise of both obligations a fair balance has to be struck between the competing interests of the individual and the community as a whole.<sup>554</sup> In striking this balance, it is noted that the state enjoys a margin of appreciation.<sup>555</sup> Article 8 obliges the state to take pro-active measures to protect the privacy of the individual as well as the corporations.

**Strasbourg court's interpretation of the notion and scope of Article 8 ECHR: the development of Strasbourg court's jurisprudence from the protection of individuals to the protection of the corporations and its application to English law**

***I The notion and scope of 'private life'***

In accordance with Strasbourg jurisprudence, respect for private life under Article 8 ECHR has been held to include an individual's personal undertakings; it has also been held to include the protection of an individual's business or professional activities, and in certain circumstances, the protection of the business and professional activities of a corporation.

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<sup>552</sup> *X and Y v The Netherlands* [1986] 8 EHRR 235, para 23; *Von Hannover v Germany* [2005] 40 EHRR 1, para 57; *I v Finland* [2009] 48 EHRR 31, para 36.

<sup>553</sup> *Societe Colas Est v France* [2004] 39 EHRR 17. This case is discussed in the 'notion and scope of private life' in the section below.

<sup>554</sup> *Gaskin v United Kingdom* [1990] 12 EHRR 36, para 42; *Evans v United Kingdom* [2008] 46 EHRR 34, para 75.

<sup>555</sup> 'Margin of Appreciation' may be defined as a doctrine which the European Courts have developed where it takes into consideration the fact that the Convention will be interpreted in different ways by the respective member states of the European Union, in view of their various historical, cultural, philosophical, and political perspective *vis-à-vis* the subject matter and background of a case in question, and therefore the European courts will take these perspectives into consideration in deciding whether to overturn the decision of a national court. See *Odievre v France* [2004] 38 EHRR 43, para 40; *Pfeifer v Austria* [2009] 48 EHRR 8, para 37.

The early use of the expression 'Margin of Appreciation' by the European Court of Human Rights can be seen in the cases such as *Engel v Netherlands* [1979-80] 1 EHRR 647 para 100; *Handyside v United Kingdom* [1979-80] 1 EHRR 737, para 48.

As indicated above, Article 8(1) prescribes that everyone has the right to respect for his 'private life', 'family life', 'home' and 'correspondence'. This comprises the right to privacy in accordance with the ECHR. Respect for private life according to Strasbourg jurisprudence has been expressed interchangeably with respect for privacy which includes private life, family life, home and correspondence; at other times, private life may overlap with other aspects of privacy as family life, home or correspondence. The term 'private life' under Article 8 ECHR according to the Strasbourg jurisprudence is a broad term not susceptible to exhaustive or restrictive definition. Pursuant therefrom, the European Court of Human Rights has held in *S v United Kingdom*,<sup>556</sup> that private life incorporates a variety of situations such as the protection of the individual's personal data,<sup>557</sup> physical and psychological integrity.<sup>558</sup> Initially, the notion of private life by the European Court of Human Rights was understood to only involve the individual's personal undertakings and did not envisage the protection of the individual's activities which were of a business or professional nature, nor did it envisage the protection of the activities of a corporation.<sup>559</sup> The position of private life solely involving the individual's personal undertakings accorded with the original objective of the establishment of Article 8 by the Council of Europe in its preparatory document.<sup>560</sup> The sole focus on the individual is illustrated in the rationale of the said Article 8 by the Consultative Assembly of the Council of Europe. As indicated by Teitgen, the rapporteur of the Consultative Assembly of

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<sup>556</sup> *S v United Kingdom* [2009] 48 EHRR 50.

<sup>557</sup> Information of an individual's health records have been held to be an aspect which affects his private life. See *Z v Finland* [1998] 25 EHRR 371; *KH v Slovakia* [2009] 39 EHRR 34; *Roche v United Kingdom* [2006] 42 EHRR 30, See also *PG v United Kingdom* [2008] 46 EHRR 51.

<sup>558</sup> The physical and psychological integrity of an individual is an aspect of private life which protects the individual's right to personal development, and the right to establish and develop relationships with other human beings and the outside world See *Friedl v. Austria* [1996] 21 EHRR 83; *Pretty v United Kingdom* [2002] 35 EHRR 1; *Mikulic v. Croatia* [2002] 1 FCR 720; *YF v Turkey* [2004] 39 EHRR 34. the physical and psychological integrity of an individual can embrace multiple aspects of the person's physical and social identity such as an individual's name, or gender identification – *Bensaid v United Kingdom* [2001] 33 EHRR 10, *Peck v United Kingdom* [2003] 36 EHRR 41; an individual's sexual orientation and sexual life – *KU v Finland* [2009] 48 EHRR 52; an individual's right to his image such as his photograph – *Sciacca v Italy* [2006] 43 EHRR 20; as well as an individual's decision to or not to become a parent – *Evans v United Kingdom* [2008] 46 EHRR 34.

<sup>559</sup> This notion of private life is illustrated in such early cases as *Golder v United Kingdom* [1979-80] 1 EHRR 524 and *Silver v United Kingdom* [1983] 5 EHRR 347 [interference with prisoners' correspondence]; *Dudgeon v United Kingdom* [1982] 4 EHRR 149 [relating to inquiry on homosexual conduct in private between consenting males]; *Malone v United Kingdom* [1985] 7 EHRR 14 [interception of postal and telephone communications].

<sup>560</sup> Council of Europe, Preparatory Work on Article 8 European Convention on Human Rights @ [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) Accessed on 13/12/2012.

August 1949, the rationale of Article 8 ECHR was the protection of the individual, anchored in

The inviolability of his private life, of his home, of his correspondence and of his family life in accordance with Article 12 of the United Nations Declaration...<sup>561</sup>

However, this view of private life solely involving the individual's personal undertakings began to evolve as the law developed, to the end that the business undertakings of the individual were held to fall within the private life of that individual as protected under Article 8 ECHR. This is illustrated in *Huwig v France*.<sup>562</sup> In this case, the applicants' private as well as business telephone lines were tapped by the police on the instruction of an investigating judge, and the applicants complained that this violated their Article 8 rights.

The European Court of Human Rights unanimously held that the tapping of both the business and private telephone lines constituted a violation of their Article 8 rights. The court declared

The telephone tapping complained of amounted without any doubt to an 'interference by a public authority' with the exercise of the applicants' right to respect for their ... 'private life'.<sup>563</sup>

In including the business telephone tapping of the applicants' as a violation of their private life, the court stated that such interference contravened Article 8 unless it was 'in accordance with the law' and 'necessary in a democratic society' for the purpose of achieving one or more of the legitimate aims referred to in Article 8(2) ECHR.

Consequently, in *Halford v United Kingdom*,<sup>564</sup> in which the applicant complained that interception of her telephone calls at her home and in her office by the police violated her Article 8 right; the European Court of Human Rights in holding, *inter alia*, that

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<sup>561</sup> Council of Europe, Preparatory Work on Article 8 European Convention on Human Rights @ [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) , page 2. Accessed on 13/12/2012.

<sup>562</sup> *Huwig v France* [1990] 12 EHRR 528.

<sup>563</sup> Para 25.

<sup>564</sup> *Halford v United Kingdom* [1997] 24 EHRR 523.

there had been a violation of Article 8 in relation to the calls made on the office telephone relied of *Huvig*'s case and declared

In the Court's view, it is clear from its case law that telephone calls made from business premises as well as from home may be covered by the notions of 'private life'...within the meaning of Article 8(1).<sup>565</sup>

As the law evolved, the question of whether the notion of 'private life' could extend beyond the above traditional understanding which entailed the specific protection of the individual's personal undertakings, and be held to solely engage the protection of an individual's business premises arose. This question was tested in the case of *Niemietz v Germany*.<sup>566</sup> In this case, the applicant complained that a search which had been carried out at his office had, *inter alia*, violated his rights under Article 8 ECHR.

The European Court of Human Rights unanimously held that the search of the applicant's office engaged a violation of his Article 8 rights. The understanding of private life under Article 8 ECHR was therefore expanded to include the business and professional premises of the individual. The court in arriving at its decision stated that it was difficult to clearly distinguish which of an individual's activities formed part of his business life and which did not; it indicated that an individual's business and non-business activities may be so intermixed that there was no means of differentiating between them. In developing the law under Article 8 to include the protection of the business and professional premises of the individual, the court declared

The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life.' However, it would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle.... To deny the protection of Article 8 on the ground that the measure complained of related only to professional activities ... could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-

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<sup>565</sup> Para 44. See also *PG v United Kingdom* [2008] 46 EHRR 51, para 42; *Kopp v Switzerland* [1999] 27 EHRR 91, para 50.

<sup>566</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

professional activities were so intermingled that there was no means of distinguishing between them.<sup>567</sup>

The court concluded that there was no reason of principle why the understanding of the notion of private life should be taken to exclude activities of a professional or business nature. It added that to interpret 'private life' as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely, to protect the individual against arbitrary interference by the public authorities.<sup>568</sup>

This case therefore established the principle that private life under Article 8 ECHR did not only protect an individual's personal undertakings, but could also solely protect an individual's business or professional activities. This principle was applied in *Van Vondel v Netherlands*<sup>569</sup> in which an applicant complained that the recording of his telephone conversations was in violation of his right to privacy under Article 8 of the convention.

The European Court of Human Rights in unanimously holding that there had been a violation of Article 8 declared

The court reiterates that the term 'private life' must not be interpreted restrictively... there is no reason of principle to justify excluding activities of a professional or business nature from the notion of 'private life'.<sup>570</sup>

Accordingly, the notion of Article 8 ECHR which had erstwhile been recognized as protecting the personal undertakings of the individual was thereby established as also protecting the individual's activities of a business and professional nature. Thus, private life under Article 8 ECHR had been extended to provide protection for the business and professional activities of the individual.<sup>571</sup>

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<sup>567</sup> Para 29.

<sup>568</sup> Para 31. *Niemietz* is also discussed under 'the notion and scope of home' below.

<sup>569</sup> *Van Vondel v Netherlands* [2009] 48 EHRR 12. This case also discussed under 'the notion and scope of 'correspondence' below.

<sup>570</sup> Para 48. The court relied on *Niemietz v Germany* [1993] 16 EHRR 97, para 29; *Halford v United Kingdom* [1997] 24 EHRR 523, para 42; *PG v United Kingdom* [2008] 46 EHRR 51, para 56.

See also *MM v Netherlands* [2004] 39 EHRR 19, para 40.

<sup>571</sup> See also *Kennedy v United Kingdom* [2011] 52 EHRR 4.

However, at the time of *Niemietz* case, the protection of business and professional activities under Article 8 was deemed one which operated for the individual alone. The closest the law got to the protection of the corporation under Article 8 was the holding of the European Commission of Human Rights in the case of *Noviflora Sweden AB v Sweden*<sup>572</sup> which dealt with a corporation's private life and correspondence. In this case which is further elaborated in the correspondence section below, a corporation complained that a search and seizure of documents conducted within its premises by public authorities constituted, *inter alia*, an unlawful interference with its right to respect for its private life under Article 8 ECHR. The Government submitted, *inter alia*, that the complaint was incompatible *ratione materiae* with the Convention; furthermore, stating that there is no indication that the seized documents did not exclusively relate to the applicant company's business activities.

The European Commission of Human Rights nevertheless rejected the objections by the government, and held, *inter alia*, the applicant's complaint admissible under Article 8. In demonstrating that the notion of private life under Article 8 is applicable to corporations, the European Commission of Human Rights declared

The Commission has carried out, in the light of the parties' submissions, a preliminary investigation of the complaints under Article 8 of the Convention... The complaints cannot therefore be declared inadmissible as manifestly ill-founded within the meaning of Article 27(2) of the Convention. No other ground for declaring them inadmissible has been established.... The Commission has rejected the Government's objections to the admissibility of those complaints... Held ... Articles 8 complaints admissible<sup>573</sup>

Article 27(2) ECHR provides that

The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

In the light of the above provision, it is suggested that in relying on Article 27(2) ECHR and finding the applicant corporation's complaint admissible, the European

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<sup>572</sup> *Noviflora Sweden AB v Sweden* [1993] 15 EHRR CD 6.

<sup>573</sup> Para 2-4.

Commission of Human Rights considered the corporation's complaint of an unlawful interference with its right to respect for its private life under Article 8 ECHR compatible with the provisions of the Convention and manifestly well-founded. In so holding, it is submitted that the European Commission of Human Rights held the notion of private life under Article 8 to be applicable to the corporation.

In a further development, advancing from the original intention of Article 8 ECHR, which reading from the preparatory document whereon the establishment of Article 8 was based was intended specifically for the protection of the individual;<sup>574</sup> the notion of private life under Article 8 ECHR by the European Court of Human Rights was held to include a corporation's registered office, branches and other business premises. This is illustrated in *Societe Colas Est v France*,<sup>575</sup> in which the applicant companies' complained that raids and seizures which were undertaken within their premises by government inspectors constituted, *inter alia*, a violation of their right to respect for their home, relying on Article 8 ECHR.

The European Court of Human Rights unanimously held that there had been violations of the companies' Article 8 rights. In extending the notion of Article 8 to include, *inter alia*,<sup>576</sup> the private life of the corporation, the court declared

The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions. [Therefore] building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Art.8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises.<sup>577</sup>

On Article 8 ECHR protecting more than the 'home' of a corporation, the court declared

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<sup>574</sup> See Council of Europe, Preparatory Work on Article 8 European Convention on Human Rights @ [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf), page 2. Accessed on 13/12/2012.

<sup>575</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>576</sup> As well as home. These are examined below.

<sup>577</sup> Para 41.



The Court considers that although the Ministry of Economic Affairs, to which the authority responsible for ordering investigations was attached at the material time, made no distinction between the power of inspection and the power of search or entry, [however] it is not necessary to determine this issue, as at all events, “the interference complained of is incompatible with Art.8 in other respects”.<sup>578</sup>

Although this case sought the Article 8 protection of the corporation’s ‘home’, as will be further elaborated in the ‘home’ section below; it is submitted that the European Court of Human Rights in stating that ‘*the interference complained of – the raids and seizures carried out at the applicants’ premises by the government inspectors – is incompatible with Article 8 in other respects*’,<sup>579</sup> the court was addressing, *inter alia*, the violation of the corporations’ private life under Article 8 ECHR.<sup>580</sup> Equally, in stating that ‘*Article 8 rights may be construed, in certain circumstances, as including the right to respect for a company’s registered office, branches or other business premises*’,<sup>581</sup> it is also submitted that the court was speaking to the understanding of the private life and home of the corporation under Article 8.

By this judgment, the court established that a corporation has, *inter alia*, a private life under Article 8 which is worthy of protection from intrusion. The court justified this approach noting that with regard to Convention rights being extended to corporations, it had already recognised a corporation’s right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6(1) of the Convention, in the case of *Comingersoll v Portugal*.<sup>582</sup>

The position of the inclusion of the professional or commercial activities of a corporation within the protection of ‘private life’ is supported by the European Commission in its *Impact assessment on the Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and*

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<sup>578</sup> Para 46.

<sup>579</sup> Para 46.

<sup>580</sup> See also the ‘correspondence’ section below.

<sup>581</sup> Para 41.

<sup>582</sup> *Comingersoll v Portugal* [2001] 31 EHRR 31, para 33-35.

disclosure.<sup>583</sup> The European Commission, in recognising that the rights guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union 2000 correspond with the rights guaranteed in Article 8 ECHR and carried with it the same meaning and scope, in accordance with the provisions of Article 52(3) of the Charter, declared

Several judgments of the European Court of Human Rights have interpreted that the notion of 'private life' cannot be taken to mean that the professional or commercial activities of either natural or legal persons are excluded (See, for instance, *Niemietz v Germany*, judgment of 16 December 1992, §29; *Société Colas Est and Others v France*, §41...) This case-law has been recognised by the European Court of Justice, which refers to the right to respect for private life as flowing from the common constitutional traditions of the Member States.<sup>584</sup>

Furthermore, the principle in *Societe Colas* wherein the notion of private life under Article 8 is established as including the protection of the corporation has also been further strengthened by the recognition and application of the principle by the Court of Justice of the European Union in the recent case of *Agrofert Holding A.S. v European Commission*.<sup>585</sup> This case, which was heard at the Court of Justice of the European Union involved, *inter alia*, the Commission invoking Article 8 ECHR. Herein, Agrofert sought the annulment of the Commission's decision to refuse it access to unpublished documents concerning the notification procedure of a merger which the Commission had authorised. The Commission in response invoked Article 8 of the ECHR as a fundamental right with regard to the respect for the privacy of its undertakings.

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<sup>583</sup> European Commission's Impact assessment on the Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 28/11/2013@ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0471:FIN:EN:PDF> Accessed on 14/02/2014.

<sup>584</sup> At page 248.

On the commitment of the EU to observe fundamental rights, see also, Colombo, E., Owen, D, and Jenkins, R. Joint Declaration by the European Parliament, the Council and the Commission: Concerning the protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Official Journal*. 1977: C 103, 1.

<sup>585</sup> *Agrofert Holding A.S. v European Commission* [2011] 4 CMLR 6.

In expressing the principle enshrined in Article 6(2) Treaty on the European Union, that the Union shall respect fundamental rights as guaranteed by the European Convention and as they result from the constitutional traditions common to the Member States, as general principles of Community law; the Court of Justice of the European Union declared

The right to respect for private life is a fundamental right which forms an integral part of the general principles of law, the observance of which the Court ensures... The right to respect for private life is, moreover, reaffirmed in art.7 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice... The notion of private life may include activities of a professional or business nature of natural or legal persons. (judgment of the European Court Of Human Rights, *Niemietz v Germany*, 16 December 1992, (1993) 16 EHRR 97, 29... *Societe Colas Est v France* (37971/97), 16 April 2002, (2004) 39 EHRR 17, 41), these being activities which may be covered by a merger notification (see, by analogy, in respect of public procurement procedures ...<sup>586</sup>

The Court of Justice of the European Union although holding that a merger notification may come within activities of a professional or business nature and within the scope of Article 8 ECHR, however, rejected the Commission's plea of Article 8 with respect to the privacy of its undertakings. It is nevertheless submitted that the Court of Justice of the European Union in espousing the notion of private life acknowledged that a corporation, just like an individual, may have a private life protected under Article 8.<sup>587</sup>

From the above, therefore, the notion of 'private life' under Article 8 ECHR was initially deemed one applicable only to the individual's personal undertakings, as illustrated, for instance, in *Golder v United Kingdom*,<sup>588</sup> and *Dudgeon v United*

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<sup>586</sup> Para 75-76.

<sup>587</sup> This principle is also reiterated in *Schenker North AB v EFTA Surveillance Authority* [2013] 4 CMLR 17, para 110.

<sup>588</sup> *Golder v United Kingdom* [1979-80] 1 EHRR 524, [interference with prisoners' correspondence]; see also *Silver v United Kingdom* [1983] 5 EHRR 347.

*Kingdom*.<sup>589</sup> This notion of private life is also seen in such protection as the protection of the individual's personal data, his physical and psychological integrity, as well as the protection of the individual's privacy in public places. With the evolution of the law, this traditional interpretation of private life was consequently developed to include the individual's activities in his business or professional life, as illustrated in *Niemietz v Germany*.<sup>590</sup> By the case of *Societe Colas Est v France*,<sup>591</sup> as affirmed in *Agrofert Holding A.S. v European Commission*,<sup>592</sup> and *Schenker North AB v EFTA Surveillance Authority*<sup>593</sup> the law has further evolved to include certain activities of a corporation within the meaning of *private life* for the purposes of Article 8.

It is therefore submitted that by the above cases, the jurisprudence of the European Court of Human Rights, as well as the Court of Justice of the European Union has evolved to the extension and applicability of the notion of 'private life' under Article 8 to corporations; and these serve as important and decisive indicators of the approach to be taken in the protection of privacy for the corporations in English law. To this end, the extended action for breach of confidence can and ought to be further developed to provide protection for the privacy of the corporation in English law – that is – the protection of the corporation's 'private life' under Article 8 ECHR. This would satisfy the provision of Article 13 ECHR which provides that there should be an effective remedy at domestic law for the violation of the rights and freedoms set forth in the ECHR; it also accords with the provision of Section 6 HRA which makes it unlawful for a United Kingdom public authority to act in a manner which is incompatible with Convention rights.

## **II The notion and scope of 'family life'**

In accordance with Strasbourg jurisprudence, family life under Article 8 ECHR has been espoused as encompassing the protection of the traditional family of the individual, as well as the individual's *de facto* family.

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<sup>589</sup> *Dudgeon v United Kingdom* [1982] 4 EHRR 149 [relating to inquiry on homosexual conduct in private between consenting males]; see also *Malone v United Kingdom* [1985] 7 EHRR 14 [interception of postal and telephone communications].

<sup>590</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

<sup>591</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>592</sup> *Agrofert Holding A.S. v European Commission* [2011] 4 CMLR 6.

<sup>593</sup> *Schenker North AB v EFTA Surveillance Authority* [2013] 4 CMLR 17.

This is illustrated by the European Court of Human Right in *Marckx v Belgium*<sup>594</sup> in which a single mother and her illegitimate child complained, *inter alia*, that certain aspects of Belgium Illegitimacy law such as, the existence of limitations on the mother's capacity to give or bequeath, and the child's capacity to take or inherit property, infringed on her right to respect for family life under Article 8 of the Convention.

The European Court of Human Rights held, *inter alia*, that the legislation in question failed to respect the applicants' family life as protected by Article 8.

In *Marckx* case, the court had to determine whether the natural relationship which exists between an unmarried mother and her illegitimate child gave rise to family life within the meaning of Article 8. In arriving at its judgment, the court therefore first sought to clarify the meaning and purport of the expression 'respect for family life' as envisaged under Article 8. To this end, the court stated that by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family; and a single mother and her child are one form of family no less than others.

The court declared

Article 8 makes no distinction between the 'legitimate' and the 'illegitimate' family. Such a distinction would not be consonant with the word 'everyone', and this is confirmed by Article 14 with its prohibition, in the enjoyment of the rights and freedoms enshrined in the Convention, of discrimination grounded on 'birth' ... Article 8 thus applies to the 'family life' of the 'illegitimate' family as it does to that of the 'legitimate' family.<sup>595</sup>

The court in making this declaration observed that at the time the ECHR was drafted, it was regarded as permissible and normal in many European countries to draw a distinction between the 'illegitimate' and the 'legitimate' family; however, there had been an evolution of the domestic law of the majority of Member States and the States have moved towards full juridical recognition of the illegitimate family. The court therefore concluded that the Convention must be interpreted in the light of present-day conditions. Thus, in holding that the relationship which exists between an unmarried

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<sup>594</sup> *Marckx v Belgium* [1979-80] 2 EHRR 330.

<sup>595</sup> Para 31. See also *Johnston v Ireland* [1987] 9 EHRR 203, para 55.

mother and her illegitimate child gives rise to family life under Article 8, the court declared

...the members of the 'illegitimate' family enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family."<sup>596</sup>

Therefore, Article 8 applies to the family life of the illegitimate family in the same manner as it does to the legitimate family.<sup>597</sup> This has been justified on the basis that 'the normal development of the natural family ties between the first and second applicants and their daughter required that she should be placed, legally and socially, in a position akin to that of a legitimate child'.<sup>598</sup> In the court's opinion, 'family life' within the meaning of Article 8 also includes situations where a unit exists between an unmarried couple and their child, such as where the couple have engaged in long periods of cohabitation.<sup>599</sup> Furthermore, the European Court of Human Rights has held that a relationship amounting to family life will exist between a child and his or her parents even if at the time of his or her birth the parents are no longer co-habiting or their relationship has ended.<sup>600</sup> Thus cohabitation is not a prerequisite of family life between unmarried parents and minor children.<sup>601</sup> The court has however held that where couples are legally married, family life will 'normally' involve cohabitation.<sup>602</sup>

Respect for family life involves an obligation for the State to act in a manner calculated to allow family ties to develop normally.<sup>603</sup> As stated above, the objective of Article 8 is principally that of protecting the individual against arbitrary interference by public authorities. In addition to this negative undertaking, as seen in the cases above, there is also a positive obligation on the State, when it determines in its domestic legal system the regime applicable to certain family ties, 'to act in a manner calculated to allow those concerned to lead a normal family life'; and a law which fails to satisfy this requirement violates Article 8(1).<sup>604</sup>

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<sup>596</sup> Para 40.

<sup>597</sup> For the legitimate family, see *Cyprus v Turkey* [1982] 4 EHRR 482.

<sup>598</sup> *Marckx v Belgium* [1979-80] 2 EHRR 330, para 74.

<sup>599</sup> *Johnston v Ireland* [1987] 9 EHRR 203; *Kroon and Others v The Netherlands* [1995] 19 EHRR 263.

<sup>600</sup> *Keegan v Ireland* [1994] 18 EHRR 342; also *Berrehab v The Netherlands* [1989] 11 EHRR 322.

<sup>601</sup> See also *Hokkanen v Finland* [1994] 19 EHRR 139; *Gul v Switzerland* [1996] 22 EHRR 93.

<sup>602</sup> *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471, para 62.

<sup>603</sup> *Marckx v Belgium* [1979-80] 2 EHRR 330.

<sup>604</sup> *Marckx v Belgium* [1979-80] 2 EHRR 330, para 31; *Johnston v Ireland* [1987] 9 EHRR 203, para 55, 71-2, 74-5; *Keegan v Ireland* [1994] 18 EHRR 342, para 49-50.

From the above, the notion of ‘family life’ under Article 8 ECHR is deemed one applicable to the traditional family as well as the *de facto* family. The interpretation of the notion of ‘family life’ has more recently been developed to include such other matters as the risk of severe environmental pollution,<sup>605</sup> prisoners’ ability to maintain contact with their close family either through visits or correspondence,<sup>606</sup> as well as the exercise of effective access to an applicant’s information concerning his health and reproductive status.<sup>607</sup> Unlike the notion of ‘private life’ dealt with above, wherein the law has evolved from its traditional interpretation of the protection of the individual to include certain activities of a corporation within the scope of Article 8, family life continues to involve the protection of the individual alone. It is observed that there is yet no Strasbourg court case which has tested whether the violation of the privacy of a group of corporations which have been recognised by law to constitute a single economic unit, such as a corporation and its subsidiaries, would amount to an interference with the family life of the said group as understood under Article 8.<sup>608</sup>

Nonetheless, ‘family life’ has been considered because an examination of the Strasbourg court’s interpretation of the notion and scope of Article 8 would be incomplete without illustrating the aspect of family life. Equally, this section has also been considered to demonstrate that although privacy is a matter which may concern the individual as well as the corporation as illustrated by Strasbourg court’s jurisprudence in private life above, and will be illustrated in its jurisprudence of ‘home’ and ‘correspondence’ below, privacy for the corporation presently excludes respect for family life; and this serves as a guide to the approach on how English law ought to be developed, that is to say, in accordance with Strasbourg’s jurisprudence. Accordingly, the protection of the family life from unwanted intrusion, and the protection of the private information resulting from the said intrusion, from publication or dissemination, is an aspect of privacy which is exclusive to the individual.

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<sup>605</sup> *Lopez Ostra v Spain* [1995] 20 EHRR 277; *Guerra and Others v Italy* [1998] 26 EHRR 357. This also overlaps with home life.

<sup>606</sup> *Ostrovar v Moldova* [2007] 44 EHRR 19. This also overlaps with correspondence.

<sup>607</sup> *KH v Slovakia* [2009] 39 EHRR 34. This also overlaps with private life.

<sup>608</sup> The principle of the commercial reality of a corporation with subsidiaries constituting a single economic unit as espoused by Lord Denning is illustrated in the case of *DHN Food Distributors v Tower Hamlets* [1976] 3 All ER 462.

### **III The notion and scope of 'home'**

In accordance with Strasbourg jurisprudence, respect for home under Article 8 ECHR has been held to include an individual's private residence, his business premises, as well as a corporation's premises.

A traditional understanding of home under Article 8 was espoused by the European Court of Human Rights in *Moreno Gomez v Spain*.<sup>609</sup> In this case, the applicant complained that the very high level of noise emanating from night clubs and bars which operated in her neighbourhood prevented her from sleeping, and caused her other health problems. Relying on Article 8, she alleged that this noise constituted interference to her right to the respect of her home.

The European Court of Human Rights held that the State had failed to discharge its positive obligation to guarantee the applicant's right to respect for her home; consequently, there had been a violation of the applicant's Article 8 rights.

In arriving at this judgment, the court espoused the notion of home and what constitutes a breach thereof, thus

A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home.<sup>610</sup>

The court added that although the objective of Article 8 is principally the protection of the individual against arbitrary interference by the public authorities, it may also

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<sup>609</sup> *Moreno Gomez v Spain* [2005] 41 EHRR 40.

<sup>610</sup> Para 53. Severe environmental pollution has been held to be a breach of the right to respect for home under Article 8. See *Lopez Ostra v Spain* [1995] 20 EHRR 277; *Guerra and Others v Italy* [1998] 26 EHRR 357; *Taskin v Turkey* [2006] 42 EHRR 50. See also *Surugiu v Romania* [App. No.48995/99, 2004] in which it was found that the dumping of several cartloads of manure within the applicant's yard constituted interference with the applicant's right to respect for his home within the meaning of Article 8.



involve the public authorities adopting measures designed to secure respect for private life in the sphere of the relations of individuals between themselves. To achieve this objective, a fair balance has to be struck between the positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under the first limb of Article 8, and the justification of interference by a public authority in accordance with the second limb of Article 8.

Accordingly, 'home' under Article 8 of the ECHR was envisaged to be an individual's private residence in which physical space the individual may enjoy the right to the development of his private and family life. This traditional understanding of the notion of home under Article 8 ECHR was the only understanding of the notion of home in the early cases heard by the European Commission and this was illustrated in the case of *X v Belgium*<sup>611</sup> in which the European Commission declared that 'home' under Article 8 was to be understood as an individual's principal residence, and that that concept of 'home' as one's principal residence was a specific concept which may not to be arbitrarily extended.<sup>612</sup>

Subsequent to this restricted understanding, as the law evolved, the notion of home came to be held to include an individual's residence which the individual may have had long periods of absence from, as long as the individual maintained sufficient links to it. This was the case in *Gillow v United Kingdom*.<sup>613</sup> In this case, the applicants who owned a house were refused permission to occupy it under the Housing Law 1969/1975 and were subsequently prosecuted for unlawful occupation. They alleged, *inter alia*, a violation of Article 8.

The European Court of Human Rights unanimously held, *inter alia*, that there had been a breach of the applicants' Article 8 rights as far as the application of the above legislation was concerned.

In arriving at this judgment, the court considered whether the applicants' residence which they had been absent from for over eighteen years qualified as 'home' as

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<sup>611</sup> *X v Belgium* (App. No.5488/72), decided on May 30, 1974. In this case, the European Commission held that the search of a vehicle could not be equated to the search of a home for the purposes of Article 8.

<sup>612</sup> See also *Arrondelle v United Kingdom* [1983] 5 EHRR 118; *Baggs v United Kingdom* [1987] 9 EHRR CD 235.

<sup>613</sup> *Gillow v United Kingdom* [1989] 11 EHRR 335.

understood under Article 8 ECHR. The court was satisfied that sufficient continuing links had been made by the applicants' as 'they had established the house in question as their home before they left it and had retained ownership of the said house, as well as the furniture in it, with the intention of returning in the future'.<sup>614</sup> As the court noted, retention of sufficient links were further demonstrated by the fact that upon the applicants' return, 'they lived in the property with the intention of taking up permanent residence there, not having established any other home elsewhere'.<sup>615</sup> For these reasons therefore, the court held that the house in question qualified as 'home' for the purposes of Article 8 of the ECHR.

Thus, the traditional notion of 'home' was extended to include private residence in which the owners had been absent for long periods, on the basis that they maintained sufficient links to it. This principle was reiterated in *Prokopovich v Russia*,<sup>616</sup> in which the court declared that the concept of 'home' within the meaning of Article 8 'is not limited to those which are lawfully occupied or which have been lawfully established; and whether or not a particular habitation constitutes a home which attracts the protection of Article 8 will depend on the factual circumstances, such as the existence of sufficient and continuous links with a specific place'.<sup>617</sup> Indeed, Strasbourg Court's jurisprudence had developed an autonomous notion of 'home' which did not depend on and was not hindered by its classification under domestic law.<sup>618</sup> Accordingly, the fundamental right of inviolability of the home under Article 8 ECHR was deemed one which was specifically applicable to the private residence of natural persons.

As the law progressed, the question of whether the notion of 'home' could extend beyond this traditional understanding which entailed the specific protection of an individual's private residence, and be held to include a business premises, arose. This

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<sup>614</sup> Para 46.

<sup>615</sup> Para 46.

<sup>616</sup> *Prokopovich v Russia* [2006] 43 EHRR 10. In this case, the applicant claimed a violation of her right to respect for her home as she had been evicted from her home - her late partner's flat - without a court order. The European Court of Human Rights held that there had been a violation of the applicant's Article 8 rights to her home.

<sup>617</sup> Para 36.

<sup>618</sup> *Ibid.* See generally, Buyse, A. Strings Attached: The Concept of "Home" in the Case Law of the European Court of Human Rights. *European Human Rights Law Review*. 2006: 3, 294-307, 295; Macdonald, R, Matscher, F, and Petzold, H. (eds) *The European System for the Protection of Human Rights*. London: Martinus Nijhoff, 1993, page 428.

was illustrated in *Hoechst AG v Commission of the European Communities*,<sup>619</sup> a case which was heard at the Court of Justice of the European Communities. On the applicant's reliance on the requirements stemming from the fundamental right to the inviolability of the home under Article 8, the Court of Justice of the European Communities noted that there at the time was no case law in the European Court of Human Rights on the subject. This court therefore declared

Since the applicant has also relied on the requirements stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right [the fundamental right to the inviolability of the home] must be recognised in the Community legal order as a principle common to the laws of the member-States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings ... afforded to business premises against intervention by the public authorities.<sup>620</sup>

As there was no case law of the European Court of Human Rights for reference on the subject, the understanding of 'home' continued to be restricted to its traditional understanding, and could not be extended to protect the business premises on the basis that the protective scope of Article 8 was concerned with the development of the individual's personality, and as such, no inference could be drawn from Article 8 regarding commercial enterprises.

This was the position before the case of *Niemietz v Germany*.<sup>621</sup> As the law further evolved, the European Court of Human rights in *Niemietz v Germany*<sup>622</sup> firmly established that the notion of 'home' under Article 8 ECHR includes the protection of an individual's professional or business premises. In this case, a complaint was made by a lawyer that a search executed at his office had, *inter alia*, violated his right to

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<sup>619</sup> *Hoechst AG v Commission of the European Communities* [1991] 4 CMLR 410. In this case, Hoechst AG was being investigated by the Commission of the European Communities in respect of alleged anti-competitive conduct. Hoechst AG sought annulment of the Commission's decision to investigate it, *inter alia*, on the grounds that it amounted to the inviolability of the home under Article 8 ECHR. This application was dismissed.

<sup>620</sup> Para 17.

<sup>621</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

<sup>622</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

respect for his home as guaranteed by Article 8 of the convention. In a unanimous judgment, it was held that there had been a violation of Article 8.<sup>623</sup>

The Strasbourg court in holding that the search of the applicant's office violated his Article 8 rights, considered the word 'home' appearing in the English text of Article 8.

As regards the word 'home,' appearing in the English text of Article 8, the Court observes that in certain Contracting States, notably Germany, it has been accepted as extending to business premises.<sup>624</sup> Such an interpretation is, moreover, fully consonant with the French text, since the word 'domicile' has a broader connotation than the word 'home' and may extend, for example, to a professional person's office ...<sup>625</sup>

The court in noting that the French text expression of home as 'domicile' carried a broader connotation than home and may extend to a professional person's office declared therefore

In this context also, it may not always be possible to draw precise distinctions, [between an individual's home and his business premises] since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises.<sup>626</sup>

To this end, the court accordingly concluded

More generally, to interpret the words [*inter alia*] 'home' as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities.<sup>627</sup>

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<sup>623</sup> Prior to *Niemietz* case, the court had held the home to include business premises: see *Chappell v United Kingdom* [1990] 12 EHRR 1. However, Chappell's case involved a business premises which also served as the home of the applicant, unlike *Niemietz* case in which the business premises in question was a purely professional premises.

<sup>624</sup> See Article 13(1) of the Basic Law for the Federal Republic of Germany, which guarantees the inviolability of the home. The court noted that this provision has been consistently interpreted by German courts in a wider sense to include business premises.

<sup>625</sup> Para 30.

<sup>626</sup> Para 30.

<sup>627</sup> Para 31. See also *Amann v Switzerland* [2000] 30 EHRR 843, para 65.

The court indicated that to interpret ‘home’ narrowly would give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of private life.<sup>628</sup> Therefore, the court understood ‘home’ under Article 8 of the Convention as encompassing the individual’s private residence, as well as his professional or business premises. This broad interpretation of the English text of Article 8 of the ECHR by reference to the French text of Article 8 accords with Article 33(1), (3) and (4) of the Vienna Convention.<sup>629</sup> Article 33(1) provides

When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

Article 33(3) provides

The terms of the treaty are presumed to have the same meaning in each authentic text.

Although paragraphs 1 and 3 of Article 33 of the Vienna Convention state that the text of a treaty which has been authenticated in two languages or more are equally authoritative, and the terms of the treaty are presumed to have the same meaning in each authenticated text; paragraph 4 of the said Article provides an exception to the above paragraphs to the end that paragraphs 1 and 3 apply

Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.<sup>630</sup>

Therefore, the broad interpretation of the notion of ‘home’ by the court in the above case of *Niemietz v Germany*<sup>631</sup> best accords with the object and purpose of ECHR

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<sup>628</sup> Para 30.

<sup>629</sup> Vienna Convention of the Law on Treaties 1969. This treaty was adopted in 1969 and entered into force in 1980. Articles 31 and 32 of the Vienna Convention provide for *general rule of interpretation* and *supplementary means of interpretation*, respectively.

<sup>630</sup> Article 33(4) Vienna Convention of the Law on Treaties 1969

<sup>631</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

which is an instrument that must be interpreted and applied in such a way as to guarantee rights which are practical and effective.<sup>632</sup>

Furthermore, in a dynamic development, advancing from the original intention of Article 8 ECHR as a human rights provision prescribed for the specific protection of the individual, the notion of ‘home’ under Article 8 has been held by the Strasbourg court to include the protection of a corporation’s registered office, branches and other business premises. This was established by the case of *Societe Colas Est v France*.<sup>633</sup> In this case, the applicant companies complained that raids and seizures which were undertaken in their premises by government inspectors constituted, *inter alia*, a violation of their right to respect for their home under Article 8 ECHR.

The European Court of Human Rights unanimously held that there had been violations of the companies’ Article 8 rights.

In extending the notion of home under Article 8 to corporations, the court referred to the case of *Niemietz v Germany*<sup>634</sup> and reiterated that the word ‘domicile’ had a broader meaning than the word ‘home’ and may extend to a professional person’s business premises. The court added that in *Chappell v United Kingdom*,<sup>635</sup> it had held that a search conducted at a private individual’s home which was also the registered office of a corporation run by the individual had amounted to interference with his right to respect for his home within the meaning of Article 8.

Accordingly, the court declared

The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present – day conditions. As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company’s right under Art.41 to compensation for non-pecuniary damage sustained as a result of a violation of Art.6(1) of the Convention. [Therefore] building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain

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<sup>632</sup> *Comingersoll v Portugal* [2001] 31 EHRR 31, para 35.

<sup>633</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>634</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

<sup>635</sup> *Chappell v United Kingdom* [1990] 12 EHRR 1.

circumstances the rights guaranteed by Art.8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises.<sup>636</sup>

On this approach, the court relied on the case of *Cossey v United Kingdom*<sup>637</sup> and declared that the Convention being a living instrument, the court's departure from an earlier decision may be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present day conditions.

The court, although acknowledging that interference by a public authority may be more far-reaching where the business premises of a juristic person are concerned, nevertheless concluded that 'the inspections in issue, on account on the manner in which they were carried out – *the inspectors simultaneous entry into the premises of the applicant companies' head and branch offices without judicial authorisation, and the seizure of various documents containing evidence unrelated to the operations in issue* – constituted intrusions' into the applicant companies' "homes" '.<sup>638</sup>

It is suggested that in holding that a corporation's registered office and other business premises constitute its home within the meaning of Article 8, and that the manner in which the raids and seizures in issue were carried out constituted intrusions into the applicant companies' homes, the court sought to realise, guarantee and safeguard Convention rights 'in a practical, effective and dynamic manner to ensures that the interpretation of the Convention reflects societal changes and remains in line with present day conditions'.<sup>639</sup> In so holding, the court had adopted an autonomous interpretation of 'home' in a manner which was not hindered by its meaning as given under domestic law.<sup>640</sup> This interpretation also accords with the court's principle in *Airey v Ireland*<sup>641</sup> to the end that the Convention is intended to guarantee 'rights that are practical and effective, and not rights that are theoretical and illusory'.

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<sup>636</sup> Para 41.

<sup>637</sup> At para 41. *Cossey v United Kingdom* [1991] 13 EHRR 622, Para 35.

<sup>638</sup> Para 46.

<sup>639</sup> On the court's dynamic interpretation of the Convention as it relates to the protection of the corporation, see generally *Comingersoll v Portugal* [2001] 31 EHRR 31, and particularly, para 35.

<sup>640</sup> This autonomous interpretation of 'home' has also been adopted in *Prokopovich v Russia* [2006] 43 EHRR 10, para 36.

<sup>641</sup> *Airey v Ireland* [1979-80] 2 EHRR 305, para 24.

This dynamic interpretation of Article 8 ECHR by the European Court of Human Rights in *Societe Colas Est v France*,<sup>642</sup> extending the notion of home thereunder to corporations, has been further reinforced by its subsequent judgments in *Buck v Germany*<sup>643</sup> and *Sallinen v Finland*.<sup>644</sup> In *Buck's* case, the court declared

The Court would point out that, as it has now repeatedly held, the notion of “home” in Art.8(1) encompasses not only a private individual's home... “home” is to be construed as including also the registered office of a company run by a private individual, as well as a juristic person's registered office, branches and other business premises.<sup>645</sup>

This declaration was subsequently reiterated in *Sallinen's* case.<sup>646</sup>

Correspondingly, the above stated principle of Article 8 including the protection of a corporation's registered office, branches and other business premises, as established by the European Court of Human Rights in *Societe Colas Est v France*,<sup>647</sup> has been adopted by the Court of Justice of the European Communities. In *Roquette Freres SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraude*,<sup>648</sup> this court relied on the *Societe Colas* judgment, as well as *Niemietz* judgment to reject its earlier position in *Hoechst* case that business premises was not included in the notion of ‘home’ under Article 8 ECHR. In departing from its *Hoechst* judgment, the court stated

...fundamental rights form an integral part of the general principles of law observance of which the Court ensures... The ECHR has special significance in that respect... For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case

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<sup>642</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>643</sup> *Buck v Germany* [2006] 42 EHRR 21.

<sup>644</sup> *Sallinen v Finland* [2007] 44 EHRR 18.

<sup>645</sup> Para 31.

<sup>646</sup> At para 70.

<sup>647</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>648</sup> *Roquette Freres SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraude* [2003] 4 CMLR 1. This case involved the requirement by the European Commission for Roquette to submit itself for an investigation concerning alleged participation in monopoly practices, and price fixing.



law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case law, first, the protection of the home provided for in Art.8 of the ECHR may in certain circumstances be extended to cover such premises and, second, the right of interference established by Art.8(2) of the ECHR “might well be more far-reaching where professional or business activities or premises (*Societe Colas Est v France*, April 16, 2002) were involved than would otherwise be the case (*Niemietz v Germany*, December 16, 1992: [1993] 16 EHRR 97).<sup>649</sup>

This principle has been further reinforced by its reiteration in the recent case of *Conseil National de l’Ordre des Pharmaciens (CNOP) v European Commission*<sup>650</sup> in which the Court of Justice of the European Union declared

...under the case law, the protection of private life provided for in art.8 of the ECHR must be respected and the protection of the home is extended to the premises of commercial companies.<sup>651</sup>

In *Schenker North AB v EFTA Surveillance Authority*,<sup>652</sup> the court similarly declared

It must also be recalled that, in certain circumstances, art.8 ECHR protects the right to respect for a company’s business premises, and that seizure of documents under an administrative investigative procedure may constitute an interference with a company’s rights pursuant to art.8 ECHR (compare the European Court of Human Rights *Société Colas Est v France* (37971/97) (2004) 39 E.H.R.R. 17 , April 16, 2002, §§ 41 and 42).<sup>653</sup>

As seen from the above, the notion of ‘home’ under Article 8 ECHR was initially deemed one which was applicable only to the private residence of natural persons, as illustrated, for instance, in the case of *X v Belgium*;<sup>654</sup> and subsequently in *Gillow v*

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<sup>649</sup> Para 23, 29.

<sup>650</sup> *Conseil National de l’Ordre des Pharmaciens (CNOP) v European Commission* [2013] 4 CMLR 27.

<sup>651</sup> Para 40.

<sup>652</sup> *Schenker North AB v EFTA Surveillance Authority* [2013] 4 CMLR 17.

<sup>653</sup> Para 166.

<sup>654</sup> *X v Belgium* (App. No.5488/72), decided on May 30, 1974. Herein, the concept of ‘home’ under Article 8 ECHR was held to be understood as an individual’s principle residence; and that that concept of ‘home’ as one’s principle residence was a specific concept which may not to be arbitrarily extended. *Arrondelle v United Kingdom* [1983] 5 EHRR 118; *Baggs v United Kingdom* [1987] 9 EHRR CD 235.

*United Kingdom*.<sup>655</sup> As the law advanced, this traditional interpretation of home was extended to the end that the individual's business or professional premises may be deemed his home within the meaning of Article 8, as illustrated in *Niemietz v Germany*.<sup>656</sup> By the *Societe Colas Est v France*<sup>657</sup> case, the law has been further developed to include the corporation's premises as its home within the meaning of Article 8. This principle of home extending to corporations' business premises has been adopted by the ECJ in *Roquette Freres SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraude*,<sup>658</sup> and *Agrofert Holding A.S. v European Commission*.<sup>659</sup>

It is therefore submitted that by the above cases, the jurisprudence of the European Court of Human Rights as well as the Court of Justice of the European Union has evolved to the extension and applicability of the notion of 'home' under Article 8 to corporations; and these serve as important and decisive indicators of the approach to be taken in the protection of privacy for the corporations in English law. To this end, as equally submitted in 'private life' above, the extended action for breach of confidence can and ought to be further developed to provide protection for the privacy of the corporation in English law – that is – the protection of the corporation's 'home' under Article 8 ECHR. This would satisfy the provision of Article 13 ECHR which provides that there should be an effective remedy at domestic law for the violation of the rights and freedoms set forth in the ECHR; it also accords with the provision of Section 6 HRA which makes it unlawful for a United Kingdom public authority to act in a manner which is incompatible with Convention rights.

#### **IV The notion and scope of 'correspondence'**

In accordance with Strasbourg jurisprudence, respect for correspondence under Article 8 ECHR has been held to include an individual's private correspondence, his business correspondence, as well as a corporation's correspondence. These correspondences

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<sup>655</sup> *Gillow v United Kingdom* [1989] 11 EHRR 335.

<sup>656</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

<sup>657</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>658</sup> *Roquette Freres SA v Directeur General de la Concurrence, de la Consommation et de la Repression des Fraude* [2003] 4 CMLR 1.

<sup>659</sup> *Agrofert Holding A.S. v European Commission* [2011] 4 CMLR 6.

may include telephone conversations, consultations with one's solicitor, as well as written, facsimile or email communications.

Initially, the understanding of correspondence under Article 8 was held to involve the individual's correspondence in his personal undertakings. This is espoused by the European Court of Human Right in cases such as *Golder v United Kingdom*<sup>660</sup> and *Silver v United Kingdom*.<sup>661</sup> In *Golder's* case, the applicant, a prisoner, complained that the refusal to allow him to consult a solicitor with a view to commencing legal proceedings amounted to, *inter alia*, a violation his right to the respect of his correspondence under Article 8. The European Court of Human Right held that there had been a violation of Article 8.

Likewise in *Silver's* case, the applicants, prisoners, complained that the control of their mail by the prison authorities constituted, *inter alia*, a breach of their rights to respect for correspondence under Article 8 ECHR.

The European Court of Human Right held that there had been a violation of Article 8. In pointing out that there was no material difference between the facts of the present case and those of *Golder v United Kingdom*,<sup>662</sup> the European Court of Human Rights declared

Restriction of correspondence... restriction on communications in connection with any legal or other business... prohibition on complaints calculated to hold the authorities up to contempt... prohibition on the inclusion in letters to legal advisers and Members of Parliament of unventilated complaints about prison treatment... was not 'necessarily in a democratic society'; .... there has therefore been a violation of Article 8 in each case.<sup>663</sup>

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<sup>660</sup> *Golder v United Kingdom* [1979-80] 1 EHRR 524.

<sup>661</sup> *Silver v United Kingdom* [1983] 5 EHRR 347.

<sup>662</sup> *Golder v United Kingdom* [1979-80] 1 EHRR 524.

<sup>663</sup> Para 99; and 105. See also *Boyle and Rice v United Kingdom* [1988] 10 EHRR 425 [interception of prisoners' mail]. For prisoners' ability to maintain contact with their close family either through visits or correspondence, see *Ostrovar v Moldova* [2007] 44 EHRR 19. For interception of doctor's correspondence with prisoner, see *Szuluk v United Kingdom* [2010] 50 EHRR 10. For interception of telephone conversations from an individual's home, see *Valenzuela Contreras v Spain* [1999] 28 EHRR 483, *Van Vondel v Netherlands* [2009] 48 EHRR 12. See also *Puzinas v Lithuania* [2010] 51 EHRR 17, for prisoners' correspondence in general.

As the law advanced, the European Court of Human Rights held ‘correspondence’ under Article 8 ECHR to involve activities occurring in the individual’s private premises as well as his business premises. This is illustrated in *Huvig v France*<sup>664</sup> wherein the applicants’ complained that the tapping of their business and private telephones violated their Article 8 rights.

In arriving at its judgment, the European Court of Human Rights declared that

The telephone tapping complained of amounted without any doubt to an ‘interference by a public authority’ with the exercise of the applicants’ right to respect for their ‘correspondence’...

This judgment was arrived at in spite of the fact that business premises was involved.<sup>665</sup> In *Halford v United Kingdom*<sup>666</sup> the European Court of Human Rights further declared that with reference to the interference with telephone calls on business premises, ‘an applicant would have a reasonable expectation of privacy for such calls’.<sup>667</sup> Such interference would result in the breach of the individual’s Article 8(1) rights unless it is in accordance with law, pursues one or more legitimate aims, and is necessary in a democratic society to achieve those aims, as intended under Article 8(2).

With the further evolution of the law, the Strasbourg court also held the understanding of ‘correspondence’ under Article 8 ECHR to solely include the individual’s correspondence of a business and professional nature. This is established in *Niemietz v Germany*.<sup>668</sup> In so extending the law, the European Court of Human Rights stated

[On the search operations by public authorities] Their operations must perforce have covered ‘correspondence’ and materials that can properly be regarded as such for the purposes of Article 8. In this connection, it is sufficient to note that that provision does not use, as it does for the word ‘life,’ any adjective to

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<sup>664</sup> *Huvig v France* [1990] 12 EHRR 528.

<sup>665</sup> This judgment was followed in *Halford v United Kingdom* [1997] 24 EHRR 523; *Amann v Switzerland* [2000] 30 EHRR 843; *Van Vondel v Netherlands* [2009] 48 EHRR 12.

<sup>666</sup> *Halford v United Kingdom* [1997] 24 EHRR 523.

<sup>667</sup> Para 45.

<sup>668</sup> *Niemietz v Germany* [1993] 16 EHRR 97. This case is also discussed in the ‘home’ section above.

qualify the word 'correspondence' ... the Court did not even advert to the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature.<sup>669</sup>

The principle in *Niemietz* case therefore established that Article 8 protects correspondence of a professional nature. It is, however, not clear whether the premises of the corporation was also envisaged in the above pronouncement. However, as indicated by the court, the provision of Article 8 does not use the word 'life' to qualify correspondence; as further indicated by the court, the possibility of Article 8 not being applicable to correspondence of a business or professional nature is not adverted to. Consequently, in the light of the above, it is suggested that in providing Article 8 protection to correspondence of a business and professional nature, the corporation's correspondence may also be included within this protection.

This notion of 'correspondence' as including a corporation's correspondence is strengthened by the further development of the law by the European Commission of Human Rights which has held the notion of 'correspondence' under Article 8 ECHR to include the corporation's correspondence. This is established in the case of *Noviflora Sweden AB v Sweden*,<sup>670</sup> in which the applicant, a corporation, complained that a search and seizure of documents conducted within its premises constituted, *inter alia*, an unlawful interference with its right to respect for its correspondence under Article 8 ECHR. The Government submitted, *inter alia*, that the complaint was incompatible *ratione materiae* with the Convention, adding that there was no indication that the despatching, transmission or reception of the corporation's correspondence was interfered with.

The European Commission of Human Rights, however, rejected the objections by the government, and held the applicant's complaint, *inter alia*, admissible under Article 8. In extending the notion of correspondence under Article 8 to corporations, it declared

The Commission has carried out, in the light of the parties' submissions, a preliminary investigation of the complaints under Article 8 of the Convention... The complaints cannot therefore be declared inadmissible as manifestly ill-founded within the meaning of Article 27(2) of the Convention.

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<sup>669</sup> Para 32.

<sup>670</sup> *Noviflora Sweden AB v Sweden* [1993] 15 EHRR CD 6.

No other ground for declaring them inadmissible has been established.... The Commission has rejected the Government's objections to the admissibility of those complaints... Held ... Articles 8 complaints admissible<sup>671</sup>

It is suggested that in relying on Article 27(2) ECHR<sup>672</sup> and finding the applicant corporation's complaint admissible, the European Commission of Human Rights considered the corporation's complaint of an unlawful interference with its right to respect for its correspondence under Article 8 ECHR compatible with the provisions of the Convention and manifestly well-founded. In so holding, it is therefore submitted that the European Commission of Human Rights held the notion of correspondence under Article 8 to be applicable to the corporation. Consequently, an intrusion into, and, or, interference with the correspondence of a corporation is engaged within the scope of Article 8. Equally, by the declaration of the European Court of Human Rights in *Societe Colas Est v France*,<sup>673</sup> that 'the interference complained of – *the raids and seizures carried out at the applicants' premises by the government inspectors* – is incompatible with Article 8 in other respects',<sup>674</sup> it is further submitted that the court was addressing, *inter alia*, the violation of the corporations' correspondence under Article 8 ECHR.<sup>675</sup> Correspondingly, building on the declaration of the European Court of Human Rights that 'Article 8 *'rights'* may be construed, in certain circumstances, as including the right to respect for a company's registered office, branches or other business premises',<sup>676</sup> it is suggested that correspondence, *inter alia*,<sup>677</sup> is an Article 8 right which may be applicable in this regard.<sup>678</sup> On the principle that the entry into the premises of the applicant companies' offices and the seizure of various documents containing evidence unrelated to the operations in issue, constituted intrusions' into the applicant companies' homes; it therefore follows that intrusion

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<sup>671</sup> Para 2-4.

<sup>672</sup> See in the *private life* section above.

<sup>673</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>674</sup> At para 46.

<sup>675</sup> As well as its private life.

<sup>676</sup> At para 41.

<sup>677</sup> As well as private life and home.

<sup>678</sup> The right to respect to private life, family life, home and correspondence according to Article 8(1) ECHR are subject to the Article 8(2) which prescribes that there shall be no interference of these rights except such interference is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

into, or publication of the correspondence of a corporation would engage the scope of Article 8.

It is therefore submitted that by the above cases, the jurisprudence of the European Commission of Human Rights as well as the European Court of Human Rights has evolved to the extension and applicability of the notion of ‘correspondence’ under Article 8 to corporations; and these serve as important and decisive indicators of the approach to be taken in the protection of privacy for the corporations in English law. To this end, as also submitted in the cases of ‘private life’ and ‘home’ above, the extended action for breach of confidence can and ought to be further developed to provide protection for the privacy of the corporation in English law – that is – the protection of the corporation’s ‘correspondence’ under Article 8 ECHR. This would satisfy the provision of Article 13 ECHR which provides that there should be an effective remedy at domestic law for the violation of the rights and freedoms set forth in the ECHR; it also accords with the provision of Section 6 HRA which makes it unlawful for a United Kingdom public authority to act in a manner which is incompatible with Convention rights.

From the above jurisprudence on privacy, therefore, it is submitted that the protection provided by Article 8 ECHR has been further developed to include the corporation’s privacy, that is to say, the protection of its *private life*, *home* and *correspondence*. This evolution has occurred notwithstanding the fact that the ECHR was primarily targeted at the protection of the individual, as illustrated by Schuman’s statement that ‘the ECHR provided foundation upon which to have defence of human personality against all tyrannies and against all forms of totalitarianism’.<sup>679</sup> Correspondingly, the European Court of Human Rights was to be a court ‘before which cases of infringement of fundamental *human* rights was to be brought to judgment’.<sup>680</sup>

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<sup>679</sup> Schuman, R. The Adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *The Sixth Session of the Council of Europe*. 4<sup>th</sup> November, 1950.

<sup>680</sup> See Winston Churchill’s statement at the Parliamentary Assembly of the Council of Europe’s 1<sup>st</sup> Session, 1949. On the ECHR, see generally, Teitgen, P.H. Introduction to the European Convention on Human Rights in Macdonald, R., Matscher, F. and Petzold, H. (eds) *The European System For The Protection Of Human Rights*. London: Martinus Dordrecht, 1993; Gomien, D., Harris, D. and Zwaak, L.

Equally, the evolution in the protection of Article 8 ECHR to include the protection of the corporation's privacy has also occurred notwithstanding the fact that Article 8 ECHR was originally intended for the sole protection of the individual, and did not envisage the inclusion of legal persons such as corporations. This is illustrated in the preparatory document upon which Article 8 was based at its institution by the Consultative Assembly of the Council of Europe. The preparatory document indicates that Article 8 ECHR was included in the agenda of the Consultative Assembly of the Council of Europe with the objective of fulfilling the declared aim of the Council of Europe, in accordance with Article 1 of the Statute, with regard to the safeguarding and further realization of Human Rights and Fundamental Freedoms.<sup>681</sup> In this preparatory document, there was no mention of legal person in the debate, nor provisions for the development of this jurisprudence in future. In the proposed drafts, amendments, and final draft of Article 8 ECHR,<sup>682</sup> there was no mention of future possibility of legal persons being a part of the said Article; it was only individuals that were envisaged in the protection, in the same manner as in Article 12 UDHR 1948.

However, the European Court of Human Rights has consistently indicated that the Convention is a living instrument with rights which will be guaranteed in a practical and effective manner to reflect the times;<sup>683</sup> and in response to the dynamic nature of interpretation of the ECHR, Article 8 has been developed and extended to protect the corporation. This may have been enabled by the provision of the preamble of the ECHR in which the rights contained in the Articles of the Universal Declaration of Human Rights 1948 were referred to as 'fundamental freedoms'. The preamble of the ECHR states

The Governments signatory hereto, being Members of the Council of Europe,  
Considering the Universal Declaration of Human Rights proclaimed by the

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*Law and Practice of the European Convention on Human Rights and the European Social Charter.* Strasbourg: Council of Europe Publishing, 1996; Van Dijk, P. and Van Hoof, G.J.H. *Theory and Practice of the European Convention on Human Rights.* 3<sup>rd</sup> edn. The Hague: Kluwer Law International, 1998; Blackburn, R. and Polakiewicz, J. *Fundamental Rights in Europe.* Oxford: Oxford University Press, 2001.

<sup>681</sup> Council of Europe, Preparatory Work on Article 8 European Convention on Human Rights @ [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) , page 2. Accessed on 13/12/2012.

<sup>682</sup> Council of Europe, Preparatory Work on Article 8 European Convention on Human Rights @ [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH\(56\)12-EN1674980.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf) , page 2, 4-5, 6-7, 8-9. Accessed on 13/12/2012.

<sup>683</sup> *Cossey v United Kingdom* [1991] 13 EHRR 622; *Societe Colas Est v France* [2004] 39 EHRR 17.



General Assembly of the United Nations on 10 December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared ... Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world ... Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration...

Thus, the Council of Europe, in taking the first step towards the collective enforcement of the Universal Declaration by the institution of the ECHR, saw the rights contained in the said Universal Declaration as not only 'human rights', but also fundamental freedoms; thus, giving allowance at inception for the future protection of non-human persons. This may also be corroborated by Article 3 of the Statute of the Council of Europe 1949 which states

Every member of the Council of Europe must accept the principles of the rule of law and enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.<sup>684</sup>

Equally, the protection of non-human persons is provided for by Article 34 ECHR which states

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Thus, the rights and freedoms of the European Convention are to be secured for natural and non-natural persons within the jurisdiction of a Contracting State; and by non-governmental organisations, the European Court of Human Rights seem to have effectively interpreted it to include the corporation.

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<sup>684</sup> Article 3, Statute of the Council of Europe 1949. The Statute of the Council of Europe found the Council of Europe, which went on to introduce the ECHR.

Nevertheless, it is acknowledged that there are Articles which are presently limited to individuals, although there is no knowing what the advances of the future may bring. The European Convention, being *a living instrument which must be interpreted in the light of present-day conditions*, may well entail that in future, a right such as the right to life under Article 2 ECHR may be extended to protect the ‘life’ of a corporation which is presently held to exist, under company law, until, for instance, the corporation is wound up. However, the focus here is Article 8 ECHR.

Accordingly, the evolution in the development of privacy protection under Article 8 ECHR by the European Court of Human Rights has occurred from the traditional protection of the individual’s privacy, to the protection of business premises of the individual, to the protection of interferences occurring in public places as seen in cases such as *Peck v United Kingdom*<sup>685</sup> and *Von Hannover v Germany*;<sup>686</sup> and most recently, to the extension of Article 8 to the corporation. The European Court of Human Rights, in the dynamic interpretation of the ECHR in line with the reflection of present day conditions in its jurisprudence,<sup>687</sup> has therefore demonstrated that the ECHR is indeed a living instrument which will guarantee rights in a practical and effective manner; and has accordingly extended the protection of Article 8 to the corporation in response to societal changes and the demands of the present times. This broad interpretation of Article 8 ECHR also accords with Article 34 ECHR, wherein a non-natural person may bring an action before the Strasbourg court. Furthermore, the Court of Justice of the European Union’s recognition of the privacy of the corporation under Article 8, as established by the European Court of Human Rights, serves to strengthen the position of this area of law. Consequently, both courts’ jurisprudence represents the law on privacy in the European area; and this evolution of privacy jurisprudence serves as an important and decisive indicator of the approach to be adopted in English law regarding the breadth and scope of protection of privacy as understood under Article 8 ECHR – which includes the protection of corporations. In accordance with this evolution, it is submitted that the extended action for breach of confidence ought to be further developed to afford protection for the privacy of the corporation in English law. This fully accords with the European Court of Human Rights jurisprudence on privacy, it would also satisfy the provision of Article 13

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<sup>685</sup> *Peck v United Kingdom* [2003] 36 EHRR 41.

<sup>686</sup> *Von Hannover v Germany* [2005] 40 EHRR 1; [2012] EMLR 16.

<sup>687</sup> *Cossey v United Kingdom* [1991] 13 EHRR 622; *Societe Colas Est v France* [2004] 39 EHRR 17.

ECHR; furthermore, it accords with the provision of Section 6 HRA. It would provide the corporation with the necessary autonomy it requires to effectively carry on its activities, within the law. In addition, it would provide adequate protection to *everyone* subject to English law; and as such, reflect the modern day reality. Finally, in the light of the proposed accession of the European Union to the ECHR which strengthens the European Court of Human Rights jurisprudence, this serves as another reason for English law to be consistent with Strasbourg's jurisprudence; this consistency is again in full accordance with the provisions of sections 2 and 6 HRA.<sup>688</sup>

## CONCLUSION

This chapter has established that by the jurisprudence of the European Court of Human Rights as well as the Court of Justice of the European Union, Article 8 ECHR provides protection for the privacy of the corporation; consequently, in accordance with these jurisprudence, the corporation's privacy *can and ought to be* developed under the extended action for breach of confidence which incorporates Article 8 and 10 ECHR into the jurisprudence of English domestic law. In the light of the above conclusion that the extended action for breach of confidence *can and ought to be* further

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<sup>688</sup> According to the Council of Europe, "Accession of the EU to the ECHR will strengthen the protection of human rights in Europe, by ultimately submitting the EU and its legal acts to the jurisdiction of the European Court of Human Rights". It adds that "It will also close gaps in legal protection by giving European citizens the same protection vis-à-vis acts of the EU as they presently enjoy from member states". See Council of Europe, Accession of the European Union @ <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention> Accessed on 10/9/2014. See also Article 6(2) (ex Article 6 Treaty on European Union) which makes provision for this accession, it declares that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

On the accession of the EU to the ECHR, see generally, European Commission and Council of Europe kick off joint talks on EU's accession to the Convention on Human Rights. Strasbourg, 7<sup>th</sup> July 2010 @ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/906&format=HTML&aged=1&language=EN&guiLanguage=en> Accessed on 25/09/2012; Reding, V. The EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe. Hearing of the European Parliament's Constitutional Affairs Committee. Brussels, 18 March 2010 @

[http://ec.europa.eu/commission\\_2010-2014/reding/pdf/speeches/speech\\_20100318\\_1\\_en.pdf](http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf)

Accessed on 25/09/2012; Jacobs, F. The European Convention on Human Rights, The EU Charter of Fundamental Rights and the European Court Of Justice: The impact of European Union accession to the European Convention on Human Rights

@ [http://www.ecln.net/elements/conferences/book\\_berlin/jacobs.pdf](http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf) Accessed on 01/02/2011; Douglas-Scott, S. The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review*. 2011: 11(4), 645-682.

The accession is in its final stages.

developed to provide protection for the corporation's privacy, it is therefore reasoned that this submission brings on the question of the details of *how* the corporation's privacy ought to be developed, in order to ensure compatibility with the Convention in accordance with sections 2 and 6 of the Human Rights Act 1998, satisfy Article 13 ECHR, as well as provide the corporation with the necessary autonomy it requires to effectively carry on its activities within the law. However, before this investigation is undertaken in the final chapter of this research, the question of whether in the alternative, the corporation's privacy would be more suitably protected if developed as a property right under Article 1 of Protocol 1 ECHR is investigated in chapter 4 below.

## **CHAPTER 4**

### **PROTECTING THE PRIVACY OF THE CORPORATION – THE DEVELOPMENT OF THE CORPORATION’S PRIVACY AS A PROPERTY RIGHT UNDER ARTICLE 1 OF PROTOCOL 1 ECHR**

#### **INTRODUCTION**

Having found that the corporation’s privacy can and ought to be developed through the extended action for breach of confidence in the preceding chapter 3, this chapter aims to determine through doctrinal analysis whether in the alternative the corporation’s privacy would be more suitably protected if developed as a property right under Article 1 of Protocol 1 of the European Convention on Human Rights 1950 {ECHR}.

To achieve this, this chapter is divided into two parts. Part 1 undertakes an examination into the established purpose and original scope of Article 1 of Protocol 1 ECHR; this examination is based on the ‘Preparatory Work on Article 1 of Protocol 1’ by the Council of Europe at the time of the establishment of the said Article in 1952. This examination is undertaken to illustrate the initial purpose of the protection of Article 1 of Protocol 1 ECHR as created by the Council of Europe, that is, for the individual; and its development to include the protection of the corporation. It is also undertaken to illustrate the restricted original scope of protection of the said Article 1, that is, to protect against the arbitrary confiscation of property by oppressive governments; and its evolution. The examination is undertaken with the overall aim of deciding whether the corporation’s privacy ought to be developed under Article 1 of Protocol 1. The investigation of whether the privacy of the corporation ought to be developed as a property right under Article 1 of Protocol 1 is the subject of part 2 of this chapter. Part 2 specifically examines the provisions of Article 1 of Protocol 1 which protect the peaceful enjoyment of possessions of both natural and legal persons, and provides for exceptional circumstances in which the State may deprive the natural or legal persons of the use of their property. These provisions are respectively tested ultimately to decide whether the corporation’s privacy would be more suitably protected if developed as a property right under Article 1 of Protocol ECHR. An investigation of the provisions of Article 1 of Protocol 1 is made with the aim of demonstrating the evolution which has occurred from a restricted original scope of protection to an enlarged actual scope of protection presently, based on the jurisprudence of the

European Court of Human Rights. This investigation is primarily undertaken because the jurisprudence of the European Court of Human Rights on the said provisions are respectively tested, to decide whether the privacy of the corporation would be more suitably protected if developed as a property right under Article 1 of Protocol 1. Likewise, the investigation of the provisions is made because the ECHR upon which the jurisprudence of the European Court of Human Rights is based, is the source from which Article 1 of Protocol 1 ensues; and also because the European Court of Human Rights is the final arbiter of human rights matters regarding Article 1 Protocol 1.

This chapter concludes that Article 1 of Protocol 1 ECHR would not suitably provide protection for the corporation's privacy.

## PART 1

### BACKGROUND: THE ESTABLISHED PURPOSE AND ORIGINAL SCOPE OF ARTICLE 1 OF PROTOCOL 1 ECHR

#### *Established purpose of Article 1 of Protocol 1*

The primary purpose of the establishment of the European Convention on Human Rights was to ensure the principles of the rule of law, human rights, and fundamental freedoms for all persons within its jurisdiction.<sup>689</sup> In establishing the ECHR, the individual's fundamental rights were at the core of the council's foundation. Similarly, the protection of the individual was the initial primary focus of the establishment of the right to property under Article 1 of Protocol 1 ECHR by the Consultative Assembly of the Council of Europe on 20<sup>th</sup> March 1952.

This focus on the individual is illustrated in the debates on the early drafts of the proposed Article 1 of Protocol 1 by the Consultative Assembly of the Council of Europe which was anchored in the free development of the individual's personality – the human personality, the development of his family, and his home. In the earliest draft, the proposed Article 1 provided

Every State party to this Convention shall guarantee to all persons within its territory the following rights ... freedom from arbitrary deprivation of property.<sup>690</sup>

Subsequent amendments which were also specific to the individual were proposed to the above draft, such as the contributions made by Andre Phillip of France,<sup>691</sup> Lord Layton of United Kingdom<sup>692</sup> and Sundt of Norway;<sup>693</sup> all of the Consultative Assembly of the Council of Europe. In the debates that ensued on the proposed Article 1 of Protocol 1 drafts, the focus on the individual is further demonstrated in Andre Phillip's statement

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<sup>689</sup> Article 3 Statute of the Council of Europe 1949.

<sup>690</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 2. Accessed on 27/04/2013.

<sup>691</sup> Ibid at page 4.

<sup>692</sup> Ibid at page 6.

<sup>693</sup> Ibid at page 12.

As regards to the rights to own property, I have submitted an amendment affirming what I think to be the true right to own property, conceived as a fundamental human right. It is the right for each one of us to own as property for the owner's personal use – truly the projection of his person – those belongings which are tied to his being. I am speaking of his furniture and of the house in which he lives ... possession of goods of personal use...<sup>694</sup>

Dominedo of Italy, of the Consultative Assembly of the Council of Europe added

[Of the right to own property] I speak naturally of the right which results in an extension of human personality...<sup>695</sup>

Cingolani of Italy, of the Consultative Assembly of the Council of Europe, on further amendments to the proposed draft also reiterated

We think that the right to own property [is] an integral part of the rights of human personality and must be confirmed in our declaration.<sup>696</sup>

These positions on the development of the human personality were reaffirmed by Bastid of France, of the Consultative Assembly of the Council of Europe, in his statement

We reaffirm that property is an extension of the personality...it is bound up with the development of the human being. Property is an extension of the man...<sup>697</sup>

Equally, it will also be noted that the focus on the individual was illustrated in the declaration of Man Entee of Ireland, of the Consultative Assembly of the Council of Europe, in his motion of 16<sup>th</sup> August 1950 in which he stated that although not representing his views, the Committee had reached a compromise and recognised that man as a human being had a right to own and enjoy property. He added

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<sup>694</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 14. Accessed on 27/04/2013.

<sup>695</sup> Ibid at page 25.

<sup>696</sup> Ibid at page 26.

<sup>697</sup> Ibid at page 91-92. See also De Valera of Ireland, *ibid* at page 27; Azara of Italy at page 68.



Of course, the right to own and enjoy property is limited... nature has intimately connected private ownership with the existence of human society and its true culture, and especially with the existence and development of a family. It is the function of private property to secure for the father of a family the true independence which he needs to discharge the duties assigned to him by the Creator.<sup>698</sup>

This focus on the right to own property as functioning for the development of the family was reiterated by the Consultative Assembly of the Council of Europe in its declarations regarding the primary purpose of the said Article 1. To this end, the majority of the Legal Committee of the Consultative Assembly stated that

[T]he right to own property is a pre-condition of personal and family independence.<sup>699</sup>

As seen from the above, these declarations by the Consultative Assembly focused on the development of the human being and the free development of his personality – the human personality, the development of his family, his home and the maintenance of his independence. This development of the individual – the human being, as well as the maintenance of his personal and family independence, represents one of the two aspects of Article 1 of Protocol 1, which is the '*personal aspect*'.<sup>700</sup>

Initially, early drafts of Article 1 of Protocol 1 did not provide for legal persons. The majority of the Committee members initially voted for the inclusion of the right to own property under Article 1 of Protocol 1 of the ECHR on the basis of the personal aspect of the right – that is the importance of the part the right played as an integral part in 'the development of the human personality and also as a pre-condition of personal and family independence'.<sup>701</sup> As such, legal persons were not included in its protection.

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<sup>698</sup> Ibid at page 73.

<sup>699</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), at page 6. Accessed on 27/04/2013.

<sup>700</sup> The second aspect is the '*economic aspect*' which is illustrated below.

<sup>701</sup> Ibid.

It is suggested that this initial exclusion of legal persons from protection under the proposed Article 1 of Protocol 1 was as a result of the fact that the protection of the legal person's right to property was deemed an economic right by the Consultative Assembly, and some of its members were of the view that economic rights ought not to be included in the guarantees of the Protocol of the ECHR to begin with. To this end, Andre Phillip of France, of the Consultative Assembly stated that the right to own property should be confined to the right to 'possession of goods for one's personal use'.<sup>702</sup> In the light of this statement, Andre Phillip declared

Once you leave possession of the goods of personal use, and you deal with goods of production, it is only possible to affirm one fundamental right: [one of an economic nature] ... This being the case, the only declaration that we could make on this point, if we want to guarantee the right to own property, would concern the ownership of personal effects. We must not go further and endow our Courts with competence ... to cover not only individual but also collective ownership; where the Court be left to decide if, in certain cases, property should be individual or collective ... This would be a grave error on our part ... I think that this must be avoided.<sup>703</sup>

Andre Phillip also added that to extend the right to own property to 'ownership of means of industrial production' would mean to introduce an economic and social aspect to the protection.<sup>704</sup>

Thus, the ownership of means of industrial production and collective ownership of an economic nature represent the '*economic aspect*' of the said Article. It was on these bases, as stated by Andre Phillip above, that the personal aspect of the proposed Article 1 of Protocol 1 initially triumphed over the economic aspect.

However, in subsequent debates which took place, the importance of the economic aspect of the protection of property was highlighted and considered;<sup>705</sup> and in the subsequent discussion of the draft, it was recognised that there were two aspects to the right to own property. Consequently, Ungood -Thomas of United Kingdom declared

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<sup>702</sup> Ibid at page 14.

<sup>703</sup> At page 14, 15.

<sup>704</sup> At page 15.

<sup>705</sup> See Mac Entee of Ireland, page 20-21; Reynaud of France, 22; De Valera of Ireland at page 26, 28.

Some of my friends on the Committee thought that you could not really have a complete life unless you had property and were able to use it in your own way. I am not disputing that at all. I do not want in the least to dispute that. But there is not only that aspect to a right of property. There is also an economic aspect. You cannot divorce the personal aspect of the right to own property from the economic aspect.<sup>706</sup>

After much deliberation a subsequent draft text was proposed and unanimously approved by the Legal Committee in its Interim Report at the Second Session of the Consultative Assembly, including legal persons in the proposed protection of Article 1 Protocol 1.<sup>707</sup> This proposed text clearly established that the right to own property under Article 1 of Protocol 1 is a fundamental principle which a person – natural or legal – is entitled to. Thus, by this text, any natural or legal person had the right to respect for, and the protection of, his or its property which may not be the object of arbitrary confiscation.

In all subsequent draft texts which were produced by the Committee of Experts, the recommendations by the Committee of Ministers and the whole Consultative Assembly, as well as the final text, legal persons were included in protection of property.<sup>708</sup> Thus, in establishing Article 1 of Protocol 1, the Council of Europe developed the protection from its initial position of the protection of the individual alone, to the protection of the individual, as well as corporations. Although the ECHR is a Convention on Human Rights, the legal person was included in its Article 1 Protocol 1 protection, and the making this inclusion was carefully considered.<sup>709</sup> In so doing, the two pillars of Article 1 of Protocol 1 – the personal aspect and the economic aspect – were recognised.

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<sup>706</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 11. Accessed on 27/04/2013.

<sup>707</sup> Ibid at pages 64-65.

<sup>708</sup> The final text of Article 1 Protocol 1 is elaborated upon in Part 2 of this chapter.

For the recommendation of the Consultative Assembly; recommendations of the individual Ministers; Committee of Experts proposed text; and the final text approved and signed on 20<sup>TH</sup> March 1952, see Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), pages 80; 76, 129, 136; 146; 160, respectively. Accessed on 27/04/2013.

<sup>709</sup> It will also be recalled that non-natural persons were also considered in Article 34 ECHR, as earlier discussed in chapter 3.

### *Original scope of Article 1 of Protocol 1*

The original scope of Article 1 of Protocol 1 ECHR, based on the Preparatory Work on Article 1 of Protocol 1 by the Council of Europe, was restricted to the protection of property from *arbitrary confiscation by oppressive governments*. To this end, an early text of the proposed Article 1 Protocol 1 reads

No one shall be arbitrarily deprived of his property. Everyone has a right to own property, alone as well as in association with others.<sup>710</sup>

On this scope, Sundt of Norway of the Consultative Assembly stated

I consider that the fact that no one should be arbitrarily deprived of his property is a fundamental minimum of individual privilege which is accepted by all civilised nations, and which therefore ought to have its place in the collective guarantee... Protection should be given to the individual to ensure that deprivation shall not take place in an arbitrary manner.<sup>711</sup>

However, in line with its dynamic manner of making Convention rights practical and effective, the European Court of Human Rights has developed the restricted scope of protection of Article 1 of Protocol 1; the Court has extended the interpretation of Article 1 of Protocol 1 beyond the protection of property from *arbitrary confiscation by oppressive governments*.<sup>712</sup> Equally, its protection is not limited to ownership of ‘physical goods’, but also to certain other ‘rights and interests’ which constitute ‘assets’ and which can also be regarded as ‘property rights’.<sup>713</sup> This principle known as the autonomous meaning principle, as well as the developed scope of Article 1 Protocol 1, as illustrated in a host of cases, are discussed in the succeeding part 2 below.

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<sup>710</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 12. Accessed on 27/04/2013. This draft was proposed by Sundt of Norway at the plenary sitting of the First Session of the Consultative Assembly of the Council of Europe on the 8<sup>th</sup> September, 1949.

<sup>711</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention on Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 13. Accessed on 27/04/2013.

See also Lord Layton of United Kingdom of the Consultative Assembly of the Council, at page 9.

<sup>712</sup> See, for instance, *Marckx v Belgium* [1979-80] 2 EHRR 330, wherein the European Court of Human Rights held, *inter alia*, that the limitations on an unmarried mother to bequeath her property to her child amounted to a violation of Article 1 of Protocol 1.

<sup>713</sup> See *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403, para 53.

## **PART 2**

### **THE DEVELOPMENT OF THE PRIVACY OF THE CORPORATION AS A PROPERTY RIGHT UNDER ARTICLE 1 OF PROTOCOL 1 ECHR: THE THREE RULES**

Having examined the established purpose and original scope of Article 1 of Protocol 1 ECHR based on the ‘Preparatory Work on Article 1 of Protocol 1’, by the Council of Europe 1952 in the preceding part of this chapter; this part examines whether the privacy of corporations ought to be regarded as a property right which can be developed under Article 1 of Protocol 1. Accordingly, the provisions of Article 1 of Protocol 1 ECHR are specifically examined, thereby investigating the *actual* scope of its protection based on the developed jurisprudence of the European Court of Human Rights. This investigation of the provisions of Article 1 of Protocol 1 is made primarily because the jurisprudence of the European Court of Human Rights on the said provisions are respectively tested, to decide whether the privacy of the corporation would be more suitably protected if developed as a property right under Article 1 of Protocol 1 ECHR.

Article 1 of Protocol 1 stipulates

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The above provisions specifically mention legal persons as included in its protection. It therefore follows that the above provisions are prescribed for the individual as well as the legal person; including corporations. On the nature of Article 1 of Protocol 1, as

encapsulated by the European Court of Human Rights in *Sporrong and Lonnroth v Sweden*<sup>714</sup>

That Article comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.<sup>715</sup>

Furthermore, in *James v United Kingdom*,<sup>716</sup> the Court added

The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.<sup>717</sup>

Thus, by virtue of its three rules, Article 1 of Protocol 1 protects natural as well as legal persons, including corporations, from arbitrary interference with their possessions by the State; equally, it recognises the right of the State to deprive a person of their possessions or control the use of a person's property with due regard to the conditions set forth in the Article.<sup>718</sup>

The object of Article 1 of Protocol 1 as expressed in Part 1 above, is the right to the protection of property. Although the first and second rules categorically refer to possessions, in substance, it is the right to protection of property which is involved.

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<sup>714</sup> *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35.

<sup>715</sup> Para 61. See also *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403, para 55; *Matos E Silva Lda v Portugal* [1997] 24 EHRR 573, para 81.

<sup>716</sup> *James v United Kingdom* [1986] 8 EHRR 123.

<sup>717</sup> Para 37. See also *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403, para 55; *Matos E Silva Lda v Portugal* [1997] 24 EHRR 573, para 81.

<sup>718</sup> See also Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*. Human Rights Handbooks, No. 10. Council of Europe, 2007@ <http://echr.coe.int/NR/rdonlyres/97564258-437D-4FFD-A54D-2766DE255CCA/0/DG2ENHRHAND102007.pdf> , page 5. Accessed on 4/05/2013.

This is conveyed in the above declarations in *Sporrong and Lonnroth v Sweeden*<sup>719</sup> and *James v United Kingdom*;<sup>720</sup> it is also conveyed in the *Marckx v Belgium*<sup>721</sup> judgment in which the European Court of Human Rights declared

By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words 'possessions' and 'use of property' (in French: biens, propriété, usage des biens); the travaux préparatoires, for their part, confirm this unequivocally: the drafters continually spoke of 'right of property' or 'right to property' to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1.<sup>722</sup>

Similarly, the European Court of Justice declared in the case of *Hauer v Land Rheinland-Pfalz*<sup>723</sup>

The right to property is guaranteed in the Community legal order in accordance with the ideas common to the Constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights.<sup>724</sup>

The right to property under Article 1 of Protocol 1 ECHR as established by the Consultative Assembly of the Council of Europe is based on Article 17 of the Universal Declaration of Human Rights 1948 which provides

Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.<sup>725</sup>

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<sup>719</sup> *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35.

<sup>720</sup> *James v United Kingdom* [1986] 8 EHRR 123.

<sup>721</sup> *Marckx v Belgium* [1979-80] 2 EHRR 330.

<sup>722</sup> At para 63. See also *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35, para 57. *Matos E Silva Lda v Portugal* [1997] 24 EHRR 573, para 81. Also see generally, Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTTravaux-P1-1-CDH(76)36-EN1190643.pdf)

Accessed on 27/04/2013.

<sup>723</sup> *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

<sup>724</sup> Para 17.

<sup>725</sup> Article 17 (1) & (2) Universal Declaration of Human Rights 1948.

The influence of Article 17 of the Universal Declaration of Human Rights in provisions of Article 1 of Protocol 1 ECHR is demonstrated in the declaration of Gulek of Turkey of the Consultative Assembly, that

The right to own property is one of these rights (we are going to guarantee). It is, moreover, been taken from the United Nations Declaration... To omit the right to own property from this European Declaration is a very important omission...<sup>726</sup>

However unlike the general right of property under Article 17 of the Universal Declaration, Article 1 of Protocol 1 goes further to prescribe restrictions to the general rules, which enable the State control the use of property in certain circumstances.<sup>727</sup>

Similarly, a right to property is also protected in Article 17 of the Charter of Fundamental Rights of the European Union 2000, and states

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

Intellectual property shall be protected.<sup>728</sup>

A right to property was not defined by the Consultative Assembly at the establishment of Article 1 of Protocol 1 ECHR by the Council of Europe. The difficulty involved in proffering a definition of a right to property for the purpose of Article 1 of Protocol 1 was expressed by the Council's Consultative Assembly. To this end, Roberts of the United Kingdom of the Consultative Assembly indicated that

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<sup>726</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf) , page 50. Accessed on 27/04/2013. See also Sir David Maxwell- Fyfe of United Kingdom, at page 32-33.

<sup>727</sup> This is discussed below.

<sup>728</sup> Article 17 (1)&(2).



...it is almost impossible to define briefly in general terms a right to property.<sup>729</sup>

In response, Pernot of France of the Consultative Assembly declared that any definition may lack clarity, nevertheless, in interpreting what a right to property means, one may rely on the jurisprudence of the Court when the time comes.

...we may rely on the European Court of Justice to discriminate, when the time comes, between what would be an arbitrary act and what would be a legitimate act.<sup>730</sup>

When considering what would amount to a violation of Article 1 of Protocol 1, the Court shall first examine whether there exists a possession – property right – falling within the ambit of that provision; secondly consider whether there has been interference with that possession; and ultimately, the nature of that interference.<sup>731</sup>

A specific examination of the three rules of Article 1 of Protocol 1 and the scope of its protection is now undertaken. In making this examination, however, it is stated, as noted by the European Court of Human Rights in *Sporrong and Lonnroth v Sweden*<sup>732</sup> and *James v United Kingdom*<sup>733</sup> that although these three rules are distinct, they are not distinct in the sense of being unconnected; they flow into each other. Thus, as far as it is possible to do so, an examination of each of these rules is undertaken in separate subsections below. These rules are then respectively tested, to decide whether the corporation's privacy would be more suitably protected if developed as a property right under Article 1 of Protocol ECHR.

### ***1. The entitlement to the peaceful enjoyment of possessions***

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<sup>729</sup> Ibid at page 83.

<sup>730</sup> Ibid at page 88.

<sup>731</sup> Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*. Human Rights Handbooks, No. 10. Council of Europe, 2007@<http://echr.coe.int/NR/rdonlyres/97564258-437D-4FFD-A54D-2766DE255CCA/0/DG2ENHRHAND102007.pdf>, page 10. Accessed on 4/05/2013.

<sup>732</sup> *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35.

<sup>733</sup> *James v United Kingdom* [1986] 8 EHRR 123.

The first rule of Article 1 of Protocol 1 provides that ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions’. This general rule applies for the natural as well as legal persons, including the corporation. The notion of the word ‘possessions’ in Article 1 of Protocol 1 was debated by the Consultative Assembly of the Council of Europe at the establishment of the said Article. Andre Phillip of France, of the Consultative Assembly stated of ‘possessions’

As regards the right to own property... It is the right for each one of us to own as property for the owner’s personal use – truly the projection of his own person – those belongings which are tied to his being. I am speaking of his furniture and the house in which he lives... This being the case, the only declaration that we could make on this point, if we want to guarantee the right to own property, would concern the ownership of personal effects.<sup>734</sup>

This definition of possessions which limits possessions to goods of personal use was questioned by Pernot of France, of the Consultative Assembly<sup>735</sup> who noted that the above definition of possessions limited the right to own property to goods of personal use such as clothing and lodging alone, and consequently questioned whether the right to own property would also protect a person’s goods of production such as cultivated land.

This position on the definition of ‘possessions’ was however expanded by Cingolani of Italy who declared

We think that the right to own property, includ[es] not only goods for personal use, but the products of thrift, and the right to own a hereditary family property...<sup>736</sup>

It will be recalled that Pernot had declared that in interpreting a definition which lacked clarity, one may rely on the jurisprudence of the Court to discriminate.<sup>737</sup> To this end, the notion of the word ‘possessions’ in Article 1 of Protocol 1 was clarified

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<sup>734</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 14-15. Accessed on 27/04/2013.

<sup>735</sup> Ibid at page 18.

<sup>736</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 26. Accessed on 27/04/2013.

<sup>737</sup> Ibid at page 88.

by the European Court on Human Rights in *Gasus Dosier- und Fördertechnik GmbH v Netherlands*.<sup>738</sup> In this case, an applicant corporation complained that the seizure of its machine by a public authority to cover for the payment of taxes deprived it of its possessions in violation of Article 1 of Protocol 1. The European Court on Human Rights stated the seizure and sale of the machine constituted an “interference” with the applicant company's right “to the peaceful enjoyment” of a “possession” within the meaning of Article 1 of Protocol 1;<sup>739</sup> however, this interference was necessary for the purpose of securing the payment of taxes, in accordance with the third rule of Article 1 of Protocol 1. The court therefore held that there had been no violation of Article 1 of Protocol 1.

In arriving at this judgment, the court elucidated on the notion of ‘possessions’

The notion “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”, for the purposes of this provision.<sup>740</sup>

This case is significant for having established the principle of Article 1 of Protocol 1 with regards to the scope of the concept of ‘possessions’. It is suggested that this autonomous meaning principle was envisaged in the preparatory work on Article 1 of Protocol 1 by the Consultative Assembly of the Council of Europe, in which Sundt of Norway stated

There is no doubt that the right to own property is so general that it is very hard to give a precise definition. The definition varies from time to time, from country to country and from party to party.<sup>741</sup>

In line with the autonomous meaning principle above, it is observed that the developed scope of Article 1 of Protocol 1 has been interpreted to include a variety of circumstances not dealing solely with *protection against the arbitrary confiscation of property by oppressive governments*; thus extending Article 1 of Protocol 1 beyond its originally established scope by the Council of Europe. Of significance is the fact that

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<sup>738</sup> *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403.

<sup>739</sup> Para 53.

<sup>740</sup> Para 53. See also *Matos E Silva Lda v Portugal* [1997] 24 EHRR 573, para 75; *Iatridis v Greece* [2000] 30 EHRR 97, para 54; *Anheuser-Busch Inc v Portugal* [2007] 45 EHRR 36, para 63.

<sup>741</sup> Page 13.

the jurisprudence of the European Court of Human Rights has prescribed the actual scope of protection of Article 1 of Protocol 1. In this regard, the Court, in developing Article 1 of Protocol 1, has held ‘possessions’ to include company shares which have economic value,<sup>742</sup> goodwill in business,<sup>743</sup> business licence,<sup>744</sup> the unchallenged rights of a parcel of land as well as the revenue derived from working on the said land,<sup>745</sup> an arbitration award which is final and binding with no appeal laid against it,<sup>746</sup> right to pension,<sup>747</sup> claim for compensation,<sup>748</sup> intellectual property.<sup>749</sup> Equally, the Court has also held ‘the entitlement to the peaceful enjoyment of possessions’ to generally engage a wide variety of circumstances such as matters of intestate succession and disposition,<sup>750</sup> expropriation permits,<sup>751</sup> business tenancies,<sup>752</sup> compensation,<sup>753</sup> refusal to recognise a contract of sale,<sup>754</sup> failure of Court to protect a minority shareholder

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<sup>742</sup> *Bramelid & Malmstrom v Sweden* [1983] 5 EHRR 249, para 1(b).

<sup>743</sup> *Van Marle v Netherlands* [1986] 8 EHRR 483.

<sup>744</sup> *Tre Traktorer AB v Sweden* [1991] 13 EHRR 309.

<sup>745</sup> *Matos E Silva Lda v Portugal* [1997] 24 EHRR 573.

<sup>746</sup> *Stran Greek Refineries and Stratis Andreadis v Greece* [1995] 19 EHRR 293.

<sup>747</sup> *Wessels-Bergervoet v Netherlands* [2004] 38 EHRR 37.

<sup>748</sup> *Pressos Compania Naviera SA v Belgium* [1996] 21 EHRR 301.

<sup>749</sup> Such as patent – see *Smith Kline and French Laboratories Ltd v Netherlands*, App. No.12633/87, Dec. 4<sup>th</sup> October, 1990; and trademark – see *Anheuser-Busch Inc v Portugal* [2007] 45 EHRR 36.

<sup>750</sup> In *Marckx v Belgium* [1979-80] 2 EHRR 330, matters involving patrimonial rights such as the limitations on an unmarried mother’s right to dispose of her property was held to fall within the ambits of the right to the peaceful enjoyment of possessions; such limitations constituted a violation of Article 1 Protocol 1.

<sup>751</sup> In *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35, expropriation permits which prohibited and restricted applicants’ right to the use of their possessions were held to impede the right of the applicants’ to the peaceful enjoyment of their possessions, and therefore violated Article 1 of Protocol 1.

<sup>752</sup> Entitlement to peaceful enjoyment of possessions under Article 1 of Protocol 1 ECHR may be applicable in cases dealing with leased properties. In *Iatridis v Greece* [2000] 30 EHRR 97 the refusal of government authorities to comply with a quashed eviction order in favour of the applicant, and the resultant inability of the applicant to regain possession of the his property was held to constitute interference with the applicant’s property rights, and thus a violation of Article 1 of Protocol 1. The fact that the property was not fully owned by the applicant was considered immaterial for the purposes of the first sentence of the said Article 1 of Protocol 1.

<sup>753</sup> In *Pressos Compania Naviera SA v Belgium* [1996] 21 EHRR 301, retrospective legislation which deprived the applicants’ the right to claim compensation was held to result in an interference with the exercise of the applicants’ rights to their entitlement to the peaceful enjoyment of their possessions; and thus a violation of Article 1 of Protocol 1. The Court stated that the claim for compensation constituted an ‘asset’ and thus amounts to ‘a possession’ for the purposes of the first sentence of Article 1 of Protocol 1. At para 31.

<sup>754</sup> In *Beyeler v Italy* [2001] 33 EHRR 52, the exercise by the Ministry of Cultural Heritage of Italy of its right of pre-emption in a contract of sale of a painting was held to undoubtedly amount to an interference with the applicant’s right to the peaceful enjoyment of his possessions, and as such, a violation of Article 1 of Protocol 1.

from oppression by the majority,<sup>755</sup> and entitlement to social welfare benefits such as pensions.<sup>756</sup> The jurisprudence of the European Court of Human Rights has progressively developed the notion of what is protected by Article 1 of Protocol 1. To this end, in a dynamic interpretation of the ECHR, the Court has stated that in certain circumstances, a ‘legitimate expectation’ of obtaining an asset could also qualify for protection under Article 1 of Protocol 1.<sup>757</sup> An example of a proprietary interest vested with a ‘legitimate expectation’ and which has been held to engage Article 1 of Protocol 1, is the application for the registration of trademark under intellectual property.<sup>758</sup>

Having illustrated the actual scope of the protection of the first rule of Article 1 of Protocol 1, above, that is, the entitlement to peaceful enjoyment of possessions, in deciding whether the corporation’s privacy ought to be developed as a property right under Article 1 of Protocol 1, the corporation’s intrusion privacy interest is tested on the first rule of Article 1 Protocol 1. To this end, the question is asked:

On the entitlement to the peaceful enjoyment of possessions under Article 1 of Protocol 1, can *intrusion* into the corporation’s premises or property constitute an interference with the peaceful enjoyment of its possessions? In order to answer this question, the first step is to ascertain whether the corporation’s premises or property can be deemed its possessions.

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<sup>755</sup> In *Sovtransavto Holdings v Ukraine* [2004] 38 EHRR 44, the failure of the Ukrainian Court to protect the applicant, a minority shareholder, from oppression by the majority and the unfair manner in which the Ukrainian Court proceedings were conducted was held to have a direct impact on the applicant company’s right to the peaceful enjoyment of its possessions; and thus, constituted a violation of Article 1 of Protocol 1.

<sup>756</sup> Article 1 of Protocol 1 guarantees entitlement to pension, or social security benefits where there is a basis for such benefits as a matter of domestic law – that is, where such benefits are in place. See *Willis v United Kingdom* [2002] 35 EHRR 21.

<sup>757</sup> Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a ‘legitimate expectation of obtaining an asset’ if there is a sufficient basis for the interest in national law, for example where there is settled case law of the domestic courts confirming its existence. See *Kopecky v Slovakia* [2005] 41 EHRR 43, para 52; *Anheuser-Busch Inc v Portugal* [2007] 45 EHRR 36, para 65. However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts. *Ibid.*

<sup>758</sup> *Anheuser-Busch Inc v Portugal* [2007] 45 EHRR 36, para 72, 78. This has been justified by the Court on the grounds that when the applicant filed its application for registration, it owned a set of proprietary rights—linked to its application for the registration of a trade mark in question.

Having stated at the beginning of this part of the chapter, in accordance with the jurisprudence of the European Court of Human Rights, that the clear impression left by the words ‘possessions’ and ‘use of property’ in the provisions of Article 1 of Protocol 1 is that in stating ‘possessions’ in the said Article, it is the protection of ‘property’ which is involved; it is therefore settled that the right to the peaceful enjoyment of possessions under Article 1 of Protocol 1 is in substance guaranteeing the right to property. Consequently, if in speaking of possessions in the rules of Article 1 of Protocol 1 it is the protection of property which is involved; it thus follows that the corporation’s premises or property can be deemed its possessions.<sup>759</sup> It is therefore submitted that there exists a possession in the premises or property of a corporation; accordingly, a corporation’s premises or property can be deemed its possessions.

Equally, as illustrated above, in accordance with the autonomous meaning principle, the European Court of Human Rights jurisprudence has developed Article 1 of Protocol 1 and broadly interprets the scope of what qualifies as possessions under the Article as not limited to physical goods, but also includes a wide range of interests which constitute assets; adding that such interests can be regarded as property rights. On the strength of this autonomous meaning principle, therefore, it is consequently submitted that the corporation’s premises or property, which can properly be regarded as an asset, *can* be deemed its possessions.

Having found that the corporation’s premises or property qualifies as its possession; can intrusion into the corporation’s premises or property constitute an interference with the peaceful enjoyment of its possessions?

It will be recalled that in chapter 1,<sup>760</sup> the first privacy interests of the corporation – the intrusion privacy interest – was established to involve the unwanted access into the corporation’s home or its property. On the strength of *Societe Colas Est v France*,<sup>761</sup> a corporation’s property or its premises – its head office and branch offices – are deemed its home and represents its own space which may be subject to an intrusion. Accordingly, it was reasoned that an unwanted access into a corporation’s premises or property for such activities as searches by a public authority, or surreptitious

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<sup>759</sup> This includes leased property. See *Iatridis v Greece* [2000] 30 EHRR 97.

<sup>760</sup> Part 3.

<sup>761</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

surveillance within such premises by the press or its agents, would constitute an intrusion into its home. From this intrusion privacy interest a definition of the corporation's privacy ensued, as the freedom from unwanted interference or disturbance – intrusion – into the corporation's private sphere which is its home or property.

Thus, on whether an intrusion into the corporation's property constitutes an interference with the peaceful enjoyment of its possessions, it is submitted that having established that the corporation's property is deemed its possessions, and reiterated that a corporation has an intrusion privacy interest to speak of; an intrusion into the corporation's property *can* constitute an interference with the peaceful enjoyment of its possessions. This accords with the principle espoused above at the beginning of this part of the chapter,<sup>762</sup> that in considering whether there has been a violation of Article 1 of Protocol 1, the Court shall first examine whether there exists a possession falling within the scope of that provision, secondly consider whether there has been interference with that possession; and ultimately, the nature of that interference.

It also accords, it is suggested, with the declaration of the Consultative Assembly of the Council of Europe on Article 1 of Protocol 1 at the time of its institution. It will be recalled, as stated in Part 1 of this chapter, that the Consultative Assembly conceded that 'it was impossible to define a right to property in general term, hence the jurisprudence of the Court would be relied upon to discriminate, when the time comes'.<sup>763</sup> It accords in the sense that the jurisprudence of the European Court of Human Rights having found that property includes assets which have economic value, it follows that the disturbance of this asset, in this case the corporation's property, would interference with the peaceful possession of it.

The development of the above declaration of the Consultative Assembly with regards to whether intrusion into corporation's property can constitute an interference with the

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<sup>762</sup> By Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*. Human Rights Handbooks, No. 10. Council of Europe, 2007@

<http://echr.coe.int/NR/rdonlyres/97564258-437D-4FFD-A54D-2766DE255CCA/0/DG2ENHRHAND102007.pdf> , page 10. Accessed on 4/05/2013.

<sup>763</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf) , page 83; 88. Accessed on 27/04/2013.

peaceful enjoyment of its possessions may be reflected in the case of *Noviflora Sweden AB v Sweden*.<sup>764</sup> In this case which was heard by the European Commission of Human Rights, the applicant, a corporation, complained, *inter alia*, that the search of its property by Government authorities constituted a violation of Article 1 of Protocol 1 ECHR. The Government objected to this complaint on the grounds that it was incompatible with the Convention as the measures complained of did not interfere with the applicant's rights under the said Article 1. The European Commission of Human Rights held the complaint, *inter alia*, admissible under Article 1 of Protocol 1.

In arriving at its decision, the European Commission of Human Rights declared

The applicant company further alleges that the search ... violated Protocol No. 1 Article 1 to the Convention. ... The Commission has rejected the Government's objections to the admissibility of those complaints. ... Accordingly, the present complaint must also be admitted.<sup>765</sup>

Following from the above, it is suggested that the European Commission of Human Rights rejection of the Government's objection to the admissibility of the applicant's complaints, and its holding that the complaint must be admitted, is indicative that Article 1 of Protocol 1 is applicable to searches. Equally, in the light of Article 27 ECHR which states that 'a single judge may declare inadmissible or strike out of the Court, an application submitted under Article 34 ECHR';<sup>766</sup> the fact that the Court declared the complaint admissible also suggests that Article 1 of Protocol 1 is applicable to searches. Furthermore, as earlier indicated, searches of the premises or property of a corporation by a public authority constitutes an intrusion; therefore, it is suggested that the intrusion interest of *Noviflora Sweden AB* was engaged by this violation.

Consequently, intrusion into the corporation's property – its possession – *can* constitute an interference with the peaceful enjoyment of its possessions. This accords with the first limb of the definition of the corporation's privacy as the freedom from unwanted intrusion into the corporation's private sphere which is its home or property.

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<sup>764</sup> *Noviflora Sweden AB v Sweden* [1993] 15 EHRR CD 6.

<sup>765</sup> Para 3.

<sup>766</sup> Article 34 ECHR states 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto...'



Pursuant to this submission, the intrusion into the entitlement of the corporation to the peaceful enjoyment of its possessions is involved where there is unwanted access into the corporation's property – its possessions.

In view of the above declaration that intrusion into the corporation's property *can* constitute an interference with the peaceful enjoyment of its possessions, for an intrusion to be justified, it must satisfy the requirements of Rule 3 of Article 1 Protocol 1 which provides that 'the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'. Thus, interference with the peaceful enjoyment of its possessions can only be justified if it is shown to be 'in accordance with the general interest' or 'subject to the conditions provided for by law'.<sup>767</sup>

This exception in providing the State with the right to enforce laws as it deems necessary to control the use of property in accordance with the general interest, is intended to make the distinction between the capricious deprivation of property and the social conception of property which is to be used for the public good.<sup>768</sup> This accords with the declaration made at the Consultative Assembly of the Council of Europe at the time of the institution of Article 1 of Protocol 1. Therein, De Valera of Ireland of the Consultative Assembly of the Council of Europe declared

Those of us who claim that the right to own property is fundamental, admit, and readily admit, that there are the demands of social justice which must be met, and that it is the right of the State to see that justice is done, and to

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<sup>767</sup> See *Brumarescu v Romania* (2001) 33 EHRR 35, para 77.

The European Court of Human Rights has held State interference 'in accordance with the general interest' and 'subject to provisions provided by law in a variety of circumstances including, but not limited to, the seizure of equipment for tax purposes – see, *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403; seizure of contraband – see, *AGOSI v United Kingdom* [1987] 9 EHRR 1; seizure of aircraft carrying contraband – see *Air Canada v United Kingdom* [1995] 20 EHRR 150; forfeiture and destruction of items whose use has been lawfully adjudged dangerous to the general interest – see *Handyside v United Kingdom* [1979-80] 1 EHRR 737; regulatory controls on the use of property by the State - *Pinnacle Meat Processors Company v United Kingdom* [1999] 27 EHRR CD 217; See also *Mellacher v. Austria* [1990] 12 EHRR 391.

<sup>768</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 14-15. Accessed on 27/04/2013.

See generally, Allen, T. *Property and The Human Rights Act 1998*. Oxford: Hart Publishing, 2005.

regulate, in the interest of the common good, the way in which individuals who own property use that property.<sup>769</sup>

Equally, any interference with property must also satisfy the requirement of fair balance and proportionality. This was stressed by the European Court of Human Rights in *Brumarescu v Romania*<sup>770</sup> in which it declared

As the Court has repeatedly stated, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for such a fair balance being inherent in the whole of the Convention. The Court further recalls that the requisite balance will not be struck where the person concerned bears an individual and excessive burden.<sup>771</sup>

The importance of achieving a fair balance and proportionality was also stressed by the European Court of Human Rights in *Gasus Dosier- und Fördertechnik GmbH v Netherlands*<sup>772</sup> in which the Court declared

The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aim pursued.<sup>773</sup>

Whether in the circumstances of each case, an applicant has had to bear ‘an individual and excessive burden’ is the essential question to bear in mind in achieving a fair balance and a reasonable relationship of proportionality.<sup>774</sup>

## ***II. Deprivation of possessions***

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<sup>769</sup> Council of Europe, Preparatory Work on Article 1 of the First Protocol, European Convention On Human Rights @ [http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH\(76\)36-EN1190643.pdf](http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-P1-1-CDH(76)36-EN1190643.pdf), page 28. Accessed on 27/04/2013.

<sup>770</sup> *Brumarescu v Romania* (2001) 33 EHRR 35.

<sup>771</sup> Para 77. See also *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403, para 62.

<sup>772</sup> *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403.

<sup>773</sup> Para 62. See also *Holy Monasteries v Greece* [1995] 20 EHRR 1, para 70.

<sup>774</sup> *Gasus Dosier- und Fördertechnik GmbH v Netherlands* [1995] 20 EHRR 403, para 67.

The second rule of Article 1 of Protocol 1 provides that ‘no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law’. This rule applies for the natural as well as legal persons, including the corporation. The principle behind the deprivation of property is the protection of the legal rights of an owner or possessor of property from deprivation of the possession of said property. In investigating matters concerning deprivation of possessions, the Court will consider whether deprivation is in the public interest and subject to the provision of law. In addition, the Court will consider whether there has been a ‘formal’ expropriation of property; it will also examine the realities of a situation to ascertain whether there has been a ‘*de facto*’ expropriation of property.<sup>775</sup>

These two types of expropriation of property: formal expropriation and *de facto* expropriation are examined below, and will be subsequently tested with the aim of deciding whether the privacy of the corporation ought to be developed as a property right under Article 1 of Protocol 1.

#### Formal expropriation

Formal expropriation occurs where a person has been deprived of ownership of their possessions. This is illustrated in the case of *Handyside v United Kingdom*.<sup>776</sup> In this case, copies of the applicant books which were held to be obscene under the Obscene Publications Acts 1959 and 1964 were seized, and the applicant complained, *inter alia*, that the seizure of the books was in violation of Article 1 of Protocol 1.

The European Court of Human Rights unanimously held that there had been no breach of Article 1 of Protocol 1. In the course of its judgment, the Court stated that the second sentence of the first paragraph of Article 1 of Protocol 1 – deprivation of possessions – was not applicable in this case, as the seizure complained of was temporary. To this end, the Court expressed its notion of ‘deprivation of possessions’ under Article 1 of Protocol 1

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<sup>775</sup> See also Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*. Human Rights Handbooks, No. 10. Council of Europe, 2007@ <http://echr.coe.int/NR/rdonlyres/97564258-437D-4FFD-A54D-2766DE255CCA/0/DG2ENHRHAND102007.pdf> , page 10. Accessed on 4/05/2013.

<sup>776</sup> *Handyside v United Kingdom* [1979-80] 1 EHRR 737.

Admittedly the expression 'deprived of his possessions', in the English text, could lead one to think otherwise but the structure of Article 1 shows that that sentence, which originated moreover in a Belgian amendment drafted in French ... applies only to someone who is 'deprived of ownership'.<sup>777</sup>

According to the above reading, deprivation of possessions applied to a person only where there had been a transfer of 'ownership' – that is, where an owner has been wholly deprived; conversely, where an owner has not been wholly deprived, a deprivation as envisaged by Rule 2 of Article 1 Protocol 1 would not have occurred.<sup>778</sup>

Therefore, a formal expropriation of property involves an acquisition or deprivation of legal title to property, whether or not physical possession is taken.<sup>779</sup> This position accorded with the established intention of the Article at the time of its inception, with themes of 'arbitrary confiscation', and 'arbitrary deprivation'; as examined in the background and purpose of Article 1 of Protocol 1 in Part 1 above. However, in line with the dynamic nature of the Convention to make rights practical and effective, the jurisprudence of the European Court of Human Rights subsequently prescribed the actual scope of the deprivation of possessions to include circumstances where there has not only been deprivation of full ownership of property, but also where there has been a *de facto* expropriation of property.

### De facto Expropriation

In the absence of formal expropriation, in which there has been a transfer of ownership of property, deprivation of possessions has also been held to involve the taking of physical possession of property, such that the owners of property are unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it. This is referred to as a *de facto* expropriation of property, and is illustrated in the case of *Papamichalopoulos v Greece*,<sup>780</sup> in which the applicants complained that they were deprived of the use of their land by virtue of a Greek law which transferred the land to the Greek Navy. They complained that the subsequent occupation of the Greek Navy on their land violated their Article 1 of Protocol 1 ECHR right.

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<sup>777</sup> Para 62.

<sup>778</sup> *Iatridis v Greece* [2000] 30 EHRR 97.

<sup>779</sup> See also *Holy Monasteries v Greece* [1995] 20 EHRR 1; *Brumărescu v. Romania* (2001) 33 EHRR 35.

<sup>780</sup> *Papamichalopoulos v Greece* [1993] 16 EHRR 440.

The European Court of Human Rights unanimously held that there had been a continued breach of Article 1 of Protocol 1. In arriving at its judgment, the Court noted that although under Greek law the applicants' land had not been formally expropriated but had instead been occupied; nevertheless, by virtue of Greece's ratification of the Convention and Article 1 of Protocol 1, the original deprivation of land occurred after said ratification of the Convention. Consequently, the Court in the absence of a formal expropriation of the land, considered whether there had been a *de facto* expropriation; and in so doing, relied on the declaration in *Sporrong and Lonnroth v Sweden*<sup>781</sup> which states

In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a *de facto* expropriation...<sup>782</sup>

The court considered that although the applicants' property had not been formally expropriated, deprivation of possessions had occurred as the owners of property were 'unable either to make use of their property or to sell, bequeath, mortgage or make a gift of it'.<sup>783</sup>

To this end, the Court concluded

The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to have been expropriated....<sup>784</sup>

The Court also noted that the Greek government interference complained of by the applicants was not for the purpose of controlling the use of property within the meaning of the second paragraph of Article 1 of Protocol 1.

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<sup>781</sup> *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35.

<sup>782</sup> Para 63. See also *Van Droogenbroeck v Belgium* [1982] 4 EHRR 443, para 38.

<sup>783</sup> *Papamichalopoulos v Greece* [1993] 16 EHRR 440, para 43. See also *Sporrong and Lonnroth v Sweden* [1983] 5 EHRR 35, para 62.

<sup>784</sup> Para 45.

Thus, from the above, in the absence of a formal expropriation of property, a *de facto* expropriation of property – that is to say a deprivation of property in a manner such that the owner is unable either to make use of their property, or to sell, bequeath, mortgage, or make a gift of it – may amount to a deprivation of possessions in accordance with Article 1 of Protocol 1. This position is reiterated in the case of *Vasilescu v Romania*<sup>785</sup> in which the applicant complained that the Romanian police had prevented her from regaining possession of her property in the form of gold coins which were seized by the police while searching her home, without a warrant, in connection with an investigation on her spouse which had been discontinued. Upon failed attempts to obtain a remedy at the National Courts, she complained at the European Court of Human Rights that seizure of the gold coins violated her right to her property under Article 1 of Protocol 1. The European Court of Human Rights in holding that there had been a violation of Article 1 Protocol 1 sought to ascertain whether the situation complained of amounted to a *de facto* confiscation, and thereto declared

The Court considers that the loss of all ability to dispose of the property in issue, taken together with the failure of the attempts made so far to have the situation remedied by the national authorities and courts, has entailed sufficiently serious consequences for it to be held that the applicant has been the victim of a *de facto* confiscation incompatible with her right to the peaceful enjoyment of her possessions.<sup>786</sup>

The Court indicated that the established unlawfulness of the seizure of the applicant's property was a decisive factor for determining the said case.

Thus, for a deprivation of possessions as envisaged under Article 1 of Protocol 1 to have occurred, there must have been an acquisition of legal title to property; or there must exist a state in which a person, natural or legal, is unable to exercise any of his rights of property such as the right to use the property, let it, or sell it.<sup>787</sup>

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<sup>785</sup> *Vasilescu v Romania* [1999] 28 EHRR 241.

<sup>786</sup> Para 53.

<sup>787</sup> In the case of *Mellacher v Austria* [1990] 12 EHRR 391, para 44, the European Court of Human Rights held that 'where there had been no transfer of a person's property, or where a person had not been deprived of their right to use, let or sell the said property', Rule 2 of Article 1 of Protocol 1 would be held not to have been engaged.

Having illustrated the actual scope of the protection of the second rule of Article 1 of Protocol 1, that is, the deprivation of possessions, above, in deciding whether the privacy of the corporation ought to be developed as a property right under Article 1 of Protocol 1, the corporation's information privacy interest is tested on the second rule of Article 1 Protocol 1.

To this end, therefore, the following question is asked:

On the subject of deprivation of possessions under Article 1 of Protocol 1, can the *disclosure* – publication or dissemination– of the corporation's private information constitute deprivation of its possession?

It will be recalled that in chapter 1,<sup>788</sup> the second privacy interests of the corporation is the information privacy interest. The information privacy interest of the corporation was established to involve the protection of the corporation's private information from unwanted dissemination or publication. It was further established that corporations have information which it could justifiably regard as private and may wish to protect from unwanted publication or dissemination. Accordingly, the private information of the corporation was held to be certain information of the corporation which it may not wish to be the subject of dissemination or publication, for instance, information obtained from the clandestine filming or listening to the activities of a board meeting, or from hacking into the corporation's telephone or computer, or from the surreptitious spying into the corporation's internal correspondence.

The focus of the corporation's information privacy interest was held to be on the dissemination or publication of the result of an interference or disturbance. This information privacy interest brought about a definition of the corporation's privacy as a claim to the control of the corporation's private information from being released into the public domain against the corporation's wishes, thereby protecting the said information from unwanted dissemination or publication.

In the light of the above understanding, on the question: can the disclosure – publication or dissemination – of the corporation's private information constitute

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<sup>788</sup> Part 3.

deprivation of its possessions? In order to answer this question, the first step is to ascertain whether the corporation's private information can be deemed its possessions.

On the established principle above, the concept of 'possessions' under Article 1 of Protocol 1 was defined as having an autonomous meaning which is not limited to the ownership of physical goods, but includes the certain rights and interests which can be regarded as assets. Pursuant therefrom, on the one hand, it is suggested that the private information of the corporation, for instance, information obtained from hacking into the corporation's computer or telephone, or from the clandestine filming or listening to the activities of a board meeting, or from the surreptitious spying into the corporation's internal correspondence, cannot properly be classified as its possessions as understood under Article 1 of Protocol 1. This is suggested on the grounds that such information does not have direct economic value, and consequently cannot be qualified as an asset. On the other hand, however, it is suggested that the private information of the corporation, for instance, the title deed of a corporation's landed property, can be deemed its possessions. This is suggested on the grounds that such private information may be classified as an interest which can constitute an asset.

In view of the above, it is therefore submitted that certain aspects of the corporation's private information can be deemed its possessions, whilst other aspects cannot. Furthermore, from the understanding of the corporation's private information, the majority of the corporation's information which would qualify as having economic value, and therefore *possessions*, would not be classified as private information, but rather as commercial information. This poses a difficulty as it limits the scope of what may be protected as the corporation's possessions as understood under Article 1 of Protocol 1.

Having found that some corporation's private information may be deemed its possessions, albeit to a limited extent, the next step is to question: can the disclosure – publication or dissemination – of the corporation's private information *which qualifies as possessions* constitute deprivation of its possessions?

It will be recalled as expressed above that deprivation of possessions involves two kinds of expropriation of property: a formal expropriation and a *de facto* expropriation. A formal expropriation of property was held to occur where a person had been wholly deprived of ownership of property, such that there had been an acquisition or



deprivation of legal title to property; a typical example of this is where there had been a transfer of ownership of property. A *de facto* expropriation was held to be involved where, in the absence of a formal deprivation of property, there had been the taking of physical possession of property, such that the owner of the said property is made unable either to make use of it; or to sell, bequeath, mortgage or make a gift of it.

Accordingly, on whether the disclosure – publication or dissemination – of the corporation's private information *which qualifies as possessions* can constitute deprivation of its possessions, it is submitted that in the light of the above definition of deprivation of possessions, the disclosure of the corporation's private information *which qualifies as possessions cannot* constitute a deprivation of its possessions under Article 1 of Protocol 1. This is rationalized on the basis that the publication or dissemination of private information cannot be said to permanently or temporarily deny a corporation of the use of the said private information which may be its possessions or property. For instance, where the contents of the corporation's private information, such as its title deed, is surreptitiously photographed, and the information obtained therefrom is published or disseminated; such disclosure cannot be argued to deprive the corporation of legal title to its property, neither can it be argued to have deprive the corporation of the right to use or sell or bequeath or mortgage or make a gift of the said possessions or property. Consequently, in the absence of a formal expropriation or a *de facto* expropriation, a deprivation of possessions cannot be held to have occurred.

Conversely, a deprivation of possession can be said to be engaged where corporation's documents containing private information *which qualifies as possessions* are seized; for instance, where the title deed of a corporation's landed property is seized. Where this occurs, it is suggested that it could constitute a *de facto* deprivation of its possessions as understood under Article 1 of Protocol 1 ECHR. This is because the seizure of the said document of the corporation can be argued to deprive the corporation of the right to use or sell or bequeath or mortgage or make a gift of it; such deprivation would in turn constitute an interference with the peaceful enjoyment of its possessions. However, the seizure of documents by a public authority is not usually undertaken for the purpose of publication or dissemination, and as such, although it may constitute a *de facto* deprivation, it would not qualify for protection under the information interest, but under the intrusion interest.

The seizure of documents was allowed under Article 1 of Protocol 1 in the earlier discussed case of *Noviflora Sweden AB v Sweden*.<sup>789</sup> Herein, the European Commission of Human Rights, in deciding, *inter alia*, whether the search and seizure of documents by Government authorities, *inter alia*, constituted a violation of Article 1 of Protocol 1, declared that ‘the applicant company’s complaint that the search and seizure of documents violated Article 1 of Protocol 1 must be admitted’.<sup>790</sup> It was however not specified under which of the three rules of Article 1 of Protocol 1 the complaint came under. It was also not specified the nature of documents in question, whether they were commercial or private documents. Nevertheless, the European Commission of Human Rights declared that the applicant’s complaint to be admissible under Article 1 of Protocol 1.

In view of the submission that seizure of the corporation’s private information, *which qualifies as possessions*, can constitute deprivation of its possessions, just as earlier illustrated in the case of an intrusion into the corporation’s property which amounts to an interference with the peaceful enjoyment of its possessions, above; for interference to be justified, such interference must be ‘in accordance with the general interest’ or ‘subject to the conditions provided for by law’ in accordance with Rule 3 of Article 1 Protocol 1; with due regard for the requirement of fair balance and proportionality.

From the above, four sets conclusions can be made: first, on whether the corporation’s private information can be deemed its possessions; secondly, on whether the disclosure – publication and dissemination – of the corporation’s private information constitutes deprivation of its possessions; thirdly, on whether the corporation’s premises or property can be deemed its possessions; and fourthly, on whether intrusion into the corporation’s premises or property constitutes an interference with the peaceful enjoyment of its possessions.

On the question of whether the corporation’s private information can be deemed its possessions, it has been established that certain aspects of the corporation’s private information can be deemed its possessions, whilst other aspects cannot. Furthermore, from the understanding of the corporation’s private information, the majority of the

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<sup>789</sup> *Noviflora Sweden AB v Sweden* [1993] 15 EHRR CD 6.

<sup>790</sup> Para 3.

corporation's information which would qualify as having economic value, and therefore *possessions*, would not be classified as private information, but rather as commercial information. This poses a difficulty as it limits the scope of what may be protected as the corporation's possessions as understood under Article 1 of Protocol 1.

On the question of whether the disclosure – publication and dissemination – of the corporation's private information constitutes deprivation of its possessions, it has been established that the disclosure of the corporation's private information *which qualify as possessions cannot* constitute a deprivation of its possessions under Article 1 of Protocol 1; because the disclosure of the said private information does not deprive the corporation of legal title to its property, nor does it deprive the corporation of the right to use or sell or bequeath or mortgage or make a gift of the said possessions or property. Consequently, it is submitted that Article 1 of Protocol 1 cannot provide protection for the information interest of the corporation.

Additionally, a deprivation of possession has conversely been established to be engaged where corporation's documents containing private information *which qualifies as possessions* are seized by a public authority. This is because the seizure of the said document can be argued to deprive the corporation of the right to use or sell or bequeath or mortgage or make a gift of it. However, this as the seizure of documents by a public authority is not usually undertaken for the purpose of publication or dissemination, although the said seizure may constitute a *de facto* deprivation, it would not qualify for protection under the information interest, but under the intrusion interest.

On the question of whether the corporation's premises or property can be deemed its possessions, it has been established that the corporation's premises or property, being an interest which qualifies as an asset, can be deemed its possessions as understood under Article 1 of Protocol 1.

On the question of whether intrusion into the corporation's premises or property constitutes an interference with the peaceful enjoyment of its possessions, it has been established that intrusion into the corporation's premises or property *can* constitute an interference with the peaceful enjoyment of its possessions under Article 1 Protocol 1.

Pursuant from the four conclusions above, it is observed that it is only in the case of intrusion into the corporation premises or property that Article 1 of Protocol 1 may provide protection; Article 1 of Protocol 1 does not provide any protection for the disclosure of private information aspect of the corporation, which focuses on the publication or the dissemination of private information. On this intrusion aspect, another difficulty arises, the difficulty herein is that it is questionable whether the peaceful enjoyment of possessions under Article 1 Protocol 1 would easily carry all aspects of intrusion into the corporation's premises or property – intrusion into the corporation may occur through interference by a public authority, or interference by press agents, or by other corporations' agents. This is because presently, the vertical application of Article 1 of Protocol 1 is not in doubt; it is however not very clear how other violations, such as, violations by the press agents, as well as other corporations would be handled; that is to say, horizontal protection. Furthermore, it is uncertain how the English courts would interpret this vagueness in view of the fact that although the HRA gives horizontal application impetus to the Articles of the ECHR,<sup>791</sup> the interpretation which the European Court of Human Rights has made on Article 1 of Protocol 1 points to cases involving protection against public authority, *ab initio*; thus, vertical application. It may be suggested that a horizontal application of Article 1 of Protocol 1 ought to be developed; however, it would seem that Article 1 of Protocol 1 is considered as a right which is applicable where the State interferes with property rights. This position is illustrated in the statement by Grgic et al,<sup>792</sup> in the human rights handbook for the Council of Europe, that 'Article 1 of Protocol 1 is not concerned with relationships between private persons'; as such, a court ruling which requires a person 'to surrender property to another pursuant to generally applicable laws under the law of contract and family law generally fall outside the precincts of the protection of Article 1 of Protocol 1'. In determining the effects of legal relations between

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<sup>791</sup> Horizontal effect is discussed in part 1 of chapter 3. In brief, it will be recalled that Sedley LJ in *Douglas v Hello! Ltd* [2001] EMLR 9, para 111, declared that "... by virtue of section 2 and section 6 of the Act, the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights."

<sup>792</sup> Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*. Human Rights Handbooks, No. 10. Council of Europe, 2007@[http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10(2007).pdf), page 6. Accessed on 4/05/2013.

individuals on property, Grgic et al<sup>793</sup> however noted that ‘in certain circumstances, the State may be under an obligation to intervene in order to regulate the actions of private persons’. Therefore, Article 1 of Protocol 1 in general applies ‘where the State itself interferes with property rights or permits a third party to do so’.<sup>794</sup> Equally, on the manner in which the right to property applies between private parties, Carss-Frisk,<sup>795</sup> in the human rights handbook for the Council of Europe, stated that

It is clear that the application of the right to property in Article 1 of Protocol No. 1 is not restricted to interferences with property which involve the transfer of some benefit to the State. This article is capable of applying to measures introduced by the State (or other public authority) which affect an individual’s property rights by transferring them to, or otherwise benefiting, another individual or individuals, or which otherwise regulate the property of an individual.<sup>796</sup>

This would seem to support the view that an interference must be in some way connected to the State to be justiciable under Article 1 of Protocol 1.

In the light of the above discussion on the limited application of intrusion protection under Article 1 of Protocol 1, as well as the above supporting declarations, it is submitted that Article 1 of Protocol 1 ECHR would not provide full protection for the intrusion aspect of the corporation’s privacy; equally, from the above, it has also been submitted that Article 1 of Protocol 1 cannot provide protection for the disclosure of information. Consequently, the privacy of the corporation *cannot* be suitably developed as a property right under Article 1 of Protocol 1 ECHR.

Accordingly, due to the nature of the dimensions of Article 8 ECHR<sup>797</sup> to provide comprehensive protection for the corporation’s privacy as has been demonstrated in

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<sup>793</sup> Grgic, A, Mataga, Z, Longar, M, and Vilfan, A. *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*. Human Rights Handbooks, No. 10.

Council of Europe, 2007@[http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10(2007).pdf), page 6. Accessed on 4/05/2013.

<sup>794</sup> Ibid.

<sup>795</sup> Carss-Frisk, M. *A Guide to the Implementation of Article 1 of Protocol 1 of the European Convention of Human Rights*. Human Rights Handbooks, No. 4. Council of Europe, 2003@<https://edoc.coe.int/en/index.php?controller=get-file&freeid=5759>, Accessed on 27/04/2013.

<sup>796</sup> Page 45.

<sup>797</sup> Right to private life, home and correspondence.

chapter 3, the extended action for breach of confidence is the more suitable medium which ought to be further developed to provide protection for the privacy of the corporation in English law.

## **CONCLUSION**

This chapter has established that Article 1 of Protocol 1 ECHR would not suitably provide protection for the corporation's privacy; rather it upholds that the extended action for breach of confidence as a more natural and suitable home for the protection of the corporation's privacy in English law. In the light of this conclusion, it is therefore reasoned that the final question of this research is directed to the details of *how* the corporation's privacy ought to be developed under the extended action. This investigation is accordingly undertaken in chapter 5 below.

## CHAPTER 5

### NATURE OF THE DEVELOPMENT OF THE CORPORATION'S PRIVACY UNDER THE EXTENDED ACTION FOR BREACH OF CONFIDENCE

In submitting that the English common law ought to be further developed in order to provide fuller protection for the privacy of the corporation, this chapter concludes this research by making a statement on why the English common law ought to be developed; and having submitted that the English common law ought to be developed through the extended action for breach of confidence, this chapter finally proposes how the corporation's privacy ought to be developed under the extended action for breach of confidence.

#### **Why the English common law ought to be developed: Section 2 & 6 HRA 1998, and Article 13 ECHR**

The position that the English law of privacy ought to be further developed to provide fuller protection for the privacy of the corporation, it is suggested, accords fully with sections 2 and 6 HRA 1998.

On the interpretation of the Convention rights, section 2(1) (a) HRA 1998 states

A court or tribunal determining a question which has arisen in connection with a Convention right *must* take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights.

On the acts of public authorities, section 6(1) states that

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.<sup>798</sup>

By section 6(3), a public authority includes a court or tribunal.

Equally, in addition to sections 2 and 6 HRA 1998, to hold that the English law of privacy ought to be further developed to provide fuller protection for the corporation's

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<sup>798</sup> Although not directly relevant to this work, that the domestic courts must have regard for the Convention rights is further demonstrated by section 3(1) HRA 1998 which deals with the interpretation of legislation. This section provides that 'So far as it is possible to do so, primary legislation and subordinate legislation *must* be read and given effect in a way which is compatible with the Convention rights'.

privacy also accords with the Strasbourg court's jurisprudence as illustrated in chapter 3. Furthermore, it fulfils the obligation as set out in Article 13 ECHR which provides

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.<sup>799</sup>

Therefore, the development of the extended action for breach of confidence to provide protection for the privacy of the corporation accords with and fulfils the requirement of sections 2 and 6 HRA 1998 in taking account of Strasbourg court's jurisprudence in determining a question in connection with a Convention right, it also accords with acting in compatibility with the Convention rights. Furthermore, the development of the extended action for breach of confidence also fulfils the requirement of an effective remedy before a national authority, as set out in Article 13 ECHR.

In view of the above, it is therefore suggested that the extended action for breach of confidence as it currently stands does not fully provide an effective remedy for the violation of Article 8 rights in accordance with the Strasbourg Court's jurisprudence which has since declared Article 8 ECHR applicable to the protection of the corporations,<sup>800</sup> on the grounds that it protects only the individual's privacy but is silent on the protection of the privacy of the corporation. As the English common law presently stands, the protection of the corporation's privacy as provided under Article 8 has not been recognised as part of the law. Pursuant thereto, the lack of protection for a violation of the privacy of the corporation in English common law may be suggested to imply that English common law has not fulfil the requirements of section 6 HRA 1998; equally, it may also be held to violate the provision of Article 13 ECHR. Consequently, for the English courts to act in a manner which is compatible with the Convention rights as prescribed by section 6 HRA, and also fulfil its obligation as instructed under Article 13 ECHR, it would have to develop the domestic law to be compatible with the Convention. To this end, it is therefore proposed that the English common would need to provide protection for all aspects of Article 8, and this would

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<sup>799</sup> *James v United Kingdom* [1986] 8 EHRR 123.

<sup>800</sup> This evolution of the law of privacy has also been fully recognised and applied by the Court of Justice of the European Union.



entail the development of the extended action for breach of confidence to provide protection for the privacy of the corporation.

In view of the issue of whether English law should be developed in the light of section 2 and 6 HRA 1998 and in compliance with Article 13 ECHR, therefore, it is a settled principle of the European Court of Human Rights jurisprudence; that a State, when it determines the regime applicable in its domestic legal system, must take into account its positive and negative obligations. In the present case, the State's positive obligation involves the adoption of measures designed to secure respect for the privacy of corporations in accordance with the jurisprudence of the European Court of Human Rights; and its negative obligation lies in protecting the corporation against arbitrary interference by public authorities. It is a generally principle of law as established by the Strasbourg court that 'a law which fails to satisfy the requirement of Member States compliance with the Convention rights' is held to violate Article 8(1)'.<sup>801</sup>

Consequently, it is submitted that English common law ought to be developed to provide protection for all aspects of Article 8 ECHR, so as to fulfil the requirements of sections 2 and 6 HRA, Article 13 ECHR, as well as to enable the State to fulfil its positive and negative obligations under the Convention. However, it is also recognised that in view of fulfilling the requirements of sections 2 and 6 HRA 1998, Article 13 ECHR, and the State's positive and negative obligations, the State enjoys a margin of appreciation.<sup>802</sup> Therefore, the question of whether English common law ought to be developed to provide protection for the privacy of the corporation would be subject to the principle of the interpretation of the Article 8 ECHR by the State, based on its historical, political, cultural and philosophical perspective. Nevertheless, it is observed that the evolution of privacy jurisprudence by the European Court of Human Rights has been fully recognised and consistently applied by the Court of Justice of the European Union, and as such has been well established in the European area. Accordingly, the development of the English common law in accordance with its

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<sup>801</sup> *Marckx v Belgium* [1979-80] 2 EHRR 330, para 31; *Johnston v Ireland* [1987] 9 EHRR 203, para 55, 71-2, 74-5; *Keegan v Ireland* [1994] 18 EHRR 342, para 49-50.

<sup>802</sup> Margin of Appreciation is defined as a doctrine which the European Courts have developed where it takes into consideration the fact that the Convention will be interpreted in different ways by the respective member states of the European Union, in view of their various historical, political, cultural, and philosophical perspective *vis-à-vis* the subject matter and background of a case in question. The European courts take these perspectives into consideration in deciding whether to overturn the decision of a national court. See *Odievre v France* [2004] 38 EHRR 43, para 40; *Pfeifer v Austria* [2009] 48 EHRR 8, para 37.

historical, political, cultural and philosophical perspective, it is suggested, would have to be balanced off with the reality of the evolution of the privacy jurisprudence in the European area; that is to say, the incorporation of the protection of the corporation under Article 8. On this point of balance, it is a recognised principle of the Strasbourg court's jurisprudence, as reiterated in *Societe Colas Est v France*<sup>803</sup> that "the Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision".<sup>804</sup>

As such, in the light of the evolution of the law in the European area, as established by the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union, it is finally submitted that English common law ought to comply with the requirements of sections 2 and 6 HRA, Article 13 ECHR, as well as its positive and negative obligations under the Convention, and develop its law to provide protection for all aspects of Article 8 ECHR. In so doing, cases involving the privacy of the corporation, as well as that of the individual would be brought on its own merit, rather than through the aspect of the corporation's privacy being shoehorned into the aspect of the individual's privacy; or, in the alternative, the aspect of the corporation's privacy not recognised at all.

The inadequacy of English common law in providing protection for the privacy of the corporation was seen in such cases as *Lakeside Homes Ltd*<sup>805</sup> and *BKM Ltd v BBC*.<sup>806</sup> In both actions, there was reluctance to bring the cases as ones involving, *inter alia*, the privacy of the corporation on its own merit; rather there was the transferring of the privacy concerns of the corporation to represent the privacy of the individual inhabitants of a corporation alone. In *BKM Ltd v BBC*,<sup>807</sup> for instance, it is observed that in the application for the injunction by the claimant corporation, it, *inter alia*, prayed the court to restrain the defendants from broadcasting 'any part of the

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<sup>803</sup> *Societe Colas Est v France* [2004] 39 EHRR 17.

<sup>804</sup> Para 47.

<sup>805</sup> *Lakeside Homes Ltd v BBC* [2000] WL 1841602.

<sup>806</sup> *BKM Ltd v BBC* [2009] EWHC 3151. Both cases are discussed in chapter 2 of this research.

<sup>807</sup> *BKM Ltd v BBC* [2009] EWHC 3151. It will be recalled that in this case, a corporation which operated a nursing home brought an application seeking an injunction to restrain the BBC from broadcasting a programme which was based on surreptitiously obtained material; and this injunction was sought, not in pursuit of any rights of its own as a corporation, but in order to protect the rights of the home's residents the court under Article 8 ECHR. The injunction was refused on the strength of the Article 10 rights of the press.

bedrooms, toilets, bathrooms and/or lounges, including the entrances thereto within the Glyndwr Nursing Home (the Surreptitious Film)’.<sup>808</sup> As argued in chapter 2, the corporation, in making the plea for the privacy of empty bathrooms or toilets being *private* areas of the corporation, it was actually speaking to a possible reasonable expectation of the privacy for itself. As contemplated by Mann J. regarding the application for relief based on the privacy of the individual

It was not clear to me why film of empty bathrooms or toilets was an infringement of privacy rights.<sup>809</sup>

On the reluctance of the corporation to bring the action on its own merits, Mann J. elaborates on his statement above and reiterates<sup>810</sup>

I have already pointed out that BKM does not rely on any of its own rights in relation to this application. It seems to rely on the rights of its residents.<sup>811</sup>

The combined effect of both statements by his Lordship arguably points to the fact that the infringement of privacy complained of with respect to the filming of the empty spaces was invariably directed at the corporation’s protection. That BKM was particularly unwilling to pursue this case as a corporate privacy case speaks to the inadequacy of the English common law with regard to the protection of the corporation’s privacy. It is suggested that the Court had an opportunity to develop the common law by stating that the corporation in the said case had a right to privacy of its private life and premises – home – in accordance with the principle in *Societe Colas*. To so state would not have been incompatible with the Convention; indeed, it would have accorded with sections 2 and 6 HRA. Furthermore, it would not have offended the provision of Article 13 ECHR; it would rather have satisfied it.

Likewise, in the case of *Schering Chemicals v Falkman Ltd*,<sup>812</sup> the interference with Schering’s internal correspondence, that is to say, the publication of the contents of the file of the said internal correspondence by Sunday Times without Schering’s consent, as well as the surreptitious taking of the said file by Sunday Times without Schering’s consent, engaged both the intrusion privacy interest and the information privacy

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<sup>808</sup> Para 8.

<sup>809</sup> Para 9

<sup>810</sup> Mann J. had emphasized this out initially in para 7.

<sup>811</sup> Para 12.

<sup>812</sup> *Schering Chemicals v Falkman Ltd* [1982] QB 1.

interest of the corporation. However, these aspects of the corporation privacy interests were not recognised nor accorded protection by the majority of the court.<sup>813</sup> It is submitted that these are aspects of the corporation's privacy which are worthy of protection in English law.

As the English law presently stands, save for broadcasting matters, privacy protection is still a matter which is restricted to the individual. Initially, privacy protection was exclusively applicable to the personal affairs of the individual. However, cases such as *Browne v Associated Newspaper Ltd*<sup>814</sup> and *Imerman v Tchenguiz*,<sup>815</sup> seem to suggest an evolution of the law to the extent that Article 8 ECHR is now applicable to an individual's business information. It will be recalled that Sir Anthony Clarke MR, in handing down the judgment of the Court of Appeal in *Browne v Associated Newspaper Ltd*<sup>816</sup> declared that 'business information which is communicated in the course of a personal relationship or learned in a domestic environment may be characterized as private, depending upon the circumstances of a particular case'; and that the question to ask in the circumstance is 'whether there was a reasonable expectation of privacy, and if there is a reasonable expectation of privacy, Article 8 would be engaged'.<sup>817</sup> Similarly, Lord Neuberger MR, in handing down the judgment of the Court of Appeal in *Imerman v Tchenguiz*,<sup>818</sup> declared that an individual's personal and business documents which were stored on a computer system were entitled to a reasonable expectation of privacy under Article 8 ECHR'.<sup>819</sup>

Consequently, it would seem that the English law of privacy for the individual, save for broadcasting matters, is at a similar stage as the Strasbourg court's law at the time of the case of *Niemietz v Germany*,<sup>820</sup> wherein the European Court on Human Rights held Article 8 ECHR as including the protection of certain professional or business activities or premises of the individual.<sup>821</sup>

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<sup>813</sup> As discussed in chapter 2.

<sup>814</sup> *Browne v Associated Newspaper Ltd* [2007] 3 WLR 289.

<sup>815</sup> *Imerman v Tchenguiz* [2011] Fam 116.

<sup>816</sup> *Browne v Associated Newspaper Ltd* [2007] 3 WLR 289.

<sup>817</sup> Paras 34, 36-37.

<sup>818</sup> *Imerman v Tchenguiz* [2011] Fam 116.

<sup>819</sup> Para 77 and 79.

<sup>820</sup> *Niemietz v Germany* [1993] 16 EHRR 97.

<sup>821</sup> Paras 29 and 31.

In arguing for the further development of corporation's privacy, therefore, Eady J declaration in *Mosley v News Group Newspaper*<sup>822</sup> is instructive. Eady J declared

...a claim for invasion of privacy nowadays involves direct application of Convention values and of Strasbourg jurisprudence as part of English law...<sup>823</sup>

Although Eady J made this declaration with regard to the protection of the individual's privacy, it is suggested that in arguing for the further development of the corporation's privacy under English common law, regard ought to be had of the evolution of the application of Convention values by Strasbourg's jurisprudence. The development of the English common law, through the extended action for breach of confidence, to provide fuller protection for the corporation's privacy would enable the corporation to exercise its autonomy in the effective administration of its activities.

### **Recommendations on *how* the corporation's privacy under English common law ought to be developed**

In putting forward an argument that English common law ought to be further developed to provide fuller protection for the privacy of the corporation, the question may arise as to how English common law ought to be developed? To this end, the framework for the proposed protection of the privacy of the corporation would be structured as follows.

#### ***Corporation's privacy interests***

The two fundamental privacy interests of the corporation would be the intrusion privacy interest and the information privacy interest.

##### **Intrusion privacy interest**

Intrusion privacy interest for the corporation would entail the freedom from unwanted access or disturbance or interference or surveillance into *the corporation's private sphere* – a sphere in which the corporation is free to carry on its activities – and this would include unwanted access into the corporation's home, or property, which

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<sup>822</sup> *Mosley v News Group Newspaper* [2008] EWHC 1777.

<sup>823</sup> Para 196.

represents its space. The breach of the corporation's intrusion privacy interest would be held to occur where there is an unwanted and unjustified access into a corporation's home or premises or property.

#### *Information privacy interest*

The information privacy interest for the corporation would entail protection against the unwanted dissemination or publication of the private information ensuing from an intrusion. The focus of the corporation's information privacy interest would be on the dissemination or publication of the result of an interference or disturbance. Accordingly, where the private information of a corporation has been obtained and taken away from the corporation, it would be the intrusion privacy interest which would be involved; however, information privacy interest would be engaged at the point of dissemination or publication. Consequently, the breach of the corporation's information privacy interest would be held to occur where there has been the unwanted and unjustified publication or dissemination of its private information. It will be recalled that although information which ensues from a corporation are generally regarded as commercial information, there are situations wherein there occurs a transmutation from the commercial sphere to the private sphere; and this occurs through the manner in which certain corporation's commercial information are handled. Instances include where there has been surreptitious obtaining and publication or dissemination of certain information ensuing from a corporation's meetings, such as policy discussions; or ensuing from its internal correspondence. These may be held to be the publication of the private information of the corporation; and publication or dissemination which may occur through the hacking into the corporation's computer or telephone, or through clandestine filming or zoom lens technology, or other clandestine means, would become subject of the information privacy interest.<sup>824</sup>

The corporation's intrusion privacy interest and the information privacy interest – the two fundamental privacy interests – independent of each other may result in a loss of the corporation's privacy; thus a privacy action may be brought where an intrusion has occurred, independent of the misuse of private information.

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<sup>824</sup> For other examples, refer to '*privacy interests*' in part 3 of chapter 1.

### ***Definitions of privacy for the corporation***

Privacy for the corporation would be defined in two limbs which incorporate the fundamental privacy interests of intrusion privacy and information privacy which are the hallmark of what privacy represents: first, as the state in which the corporation wishes to be free from unwanted interference or disturbance – intrusion – into its private sphere, and this includes its home or its property which represents its own space; and secondly, as a claim to the control of the corporation's private information from being released into the public domain against the corporation's wishes, thus protecting the said information from unwanted dissemination or publication.

### ***Rationale of privacy for the corporation***

The rationale for the protection of the corporation's privacy is held to be the autonomy rationale. The function of this autonomy gives the corporation, the power and control to make a choice in deciding who to grant access into its premises or its property, as well as who to disclose its private information to. Accordingly, it is submitted that a corporation can exercise autonomy in its home or property to protect its intrusion privacy interest and its information privacy interest; and the corporation's ability to exercise autonomy in the management of its activities justifies the importance of this rationale.

Although only one rationale of privacy is engaged in the case of the corporation, this does not deny the corporation the proposition for privacy protection in English law. As submitted in chapter 1, the autonomy rationale is an independent privacy rationale for the corporation; it applies as a stand-alone rationale. This accords with the views of scholars such as Bloustein,<sup>825</sup> Warren and Brandeis,<sup>826</sup> and Neill,<sup>827</sup> who although referring to the individual's privacy protection, nevertheless, defined the rationale of privacy solely on a single rationale. Equally, it is suggested that the protection by the Broadcasting Act 1996 of the privacy of the corporation in broadcasting matters is based on this sole rationale of autonomy of the corporation – that is to say, its ability to

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<sup>825</sup> Bloustein, E.J. Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser. *New York University Law Review*. 1964: 39, 962-1007.

<sup>826</sup> Warren, S.D. and Brandeis, L.D. The Right To Privacy. *Harvard Law Review*. 1890: 4(5), 193-220.

<sup>827</sup> Neill, B. A Challenge for the Next Century in Markensins, B.A. (ed) *Protecting Privacy*. Oxford: Oxford University Press, 1999.

protect itself from unwanted intrusion and interference.<sup>828</sup> As such, the privacy of the corporation is fully supported by the autonomy rationale alone.

### *The methodology*

The name of the action for the protection of the corporation's privacy would be known as the extended action for breach of confidence. The emergence of the extended action for breach of confidence for the individual brought with it a new methodology for adjudicating privacy cases. This new methodology incorporated Article 8 and 10 ECHR into the cause of action for breach of confidence; the threshold test which was established was that in cases involving privacy, the question to ask is: whether in respect of the interference complained about there is a reasonable expectation of privacy. This test brings on the balancing exercise.

It is suggested that for the corporation, the principles established by the new methodology for privacy remain the same. Therefore, in a privacy case of the corporation, the extended action for breach of confidence which would protect against the violation of the corporation's privacy would also be established through the incorporation of Article 8 and 10 ECHR into the cause of action for breach of confidence. The threshold test under the new methodology would equally apply to the corporation – whether in respect of the interference complained about by the corporation, there is a reasonable expectation of privacy. This test, if answered in the negative ends the case; but if answered in the affirmative, would bring on the balancing exercise which are of two types, depending on the defendant. On the one hand, where the interference complained by the corporation is against the press, then the balancing exercise would be between the corporation's Article 8 ECHR right to privacy and the press Article 10 ECHR right to freedom of expression. On the other hand, where the interference complained of by the corporation is against a public authority, then, the balancing exercise would be between Article 8(1) and (2) ECHR. The corporation's privacy case would then be decided on the basis of proportionality, as with the individual's case.

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<sup>828</sup> From "unwarranted infringements of privacy". Section 110(1)(b) Broadcasting Act 1996.



Therefore, the extended action for breach of confidence would protect the privacy of the individual and also the corporation. However, in the case of the corporation, its interests in Article 8 ECHR are different from that of an individual. In the individual's case, Article 8 protects his private life, family life, home and correspondence from intrusion as well as interference with his private information. In the case of the corporation, Article 8 ECHR would protect the corporation's private life, its home, and its correspondence from intrusion as well as interference with its private information. However, it is suggested that the weight of interest in the protection of privacy for the corporation would depend on the type of the corporation involved, to the end that it would affect the manner in which damages are enforced, as seen below.

### ***Remedies***

This section sets out the remedies which may be available to the corporation in the event of a complaint of a violation of its privacy.

In considering the grant of a remedy in a case against the press, the court would have to take into particular consideration section 12 HRA. Accordingly, this section would apply where a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.<sup>829</sup> If the person against whom the application for relief is made is neither present nor represented, no such relief would be granted unless the court is satisfied that the applicant has taken all practicable steps to notify the respondent; or, that there are compelling reasons why the respondent should not be notified.<sup>830</sup> In addition, no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.<sup>831</sup> And finally, the court must have particular regard to the importance of the Convention right to freedom of expression. Where it appears to the court that proceedings relate to journalistic, literary or artistic material, the court must have particular regard to (i) the extent to which the material has, or is about to become available to the public, or (ii) whether it would be in the

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<sup>829</sup> Section 12(1) HRA.

<sup>830</sup> Section 12(2) HRA.

<sup>831</sup> Section 12(3) HRA.

public interest for the material to be published, and (iii) any relevant privacy code.<sup>832</sup> Pursuant to the foregoing, there is a high threshold in favour of the press on the subject of remedies.

The remedies which would be available to the corporation in the case of a violation of its privacy may be held to be the following:

### Injunction

Injunctions available to the corporation may take the form of interim injunctions and final injunctions. The court may award the corporation the remedy of an interim injunction before or during a trial to restrain the publication or dissemination of the result of an intrusion into the corporation's premises or property, where the corporation is aware of a pending dissemination or publication of said information. However, where publication or dissemination has already occurred, and at the end of a successful trial in favour of the corporation there is a continuing threat of further publication or dissemination on the corporation, then a final injunction may be awarded to prevent further publication or dissemination.

Similarly, an injunction may be granted to prevent intrusion into the corporation's premises or property. As in the case of dissemination or publication, an interim injunction may be granted to prevent an intrusion whilst a case is pending; and if the case is successful, a final injunction may be granted to prevent further intrusions for a set period of time, or indefinitely.

However, as seen from the above, section 12 HRA is particularly important in cases of restraining orders; consequently, in considering the grant of an injunction, the court must apply section 12 HRA; particularly, section 12(3) HRA, wherein, the court, in granting an interim injunction, must be satisfied that the applicant is likely to succeed at trial in establishing that publication should not be allowed. Furthermore, in deciding whether to grant an interim injunction which affects the freedom of expression, the courts, in considering the requirements of section 12 HRA, would have to balance the freedom of expression under Article 10 ECHR with the corporation's rights to privacy under Article 8 ECHR in arriving at a decision.

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<sup>832</sup> Section 12(4) HRA.

## Damages

Damages may be awarded in addition to injunction, in the spirit of the principle of Lord Cairns' Act 1858.<sup>833</sup> Damages may also be awarded in lieu of an injunction where the harm sustained can be calculated in monetary terms, and it would be oppressive to grant an injunction. The award of damages may be available to the corporation for a successful plea of an invasion of privacy. The justification for such an award would be for the treatment of harm or unfairness suffered as a result of a violation of the corporation's autonomy. However, the nature of the corporation involved would affect the manner in which damages are enforced.

As seen in the case of Defamation Law, the Defamation Act 2013 provides that

A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.<sup>834</sup>

From this provision, the law seems to make a general rule for non-profit persons, to the end that they must prove serious harm in a claim for defamation.

The Defamation Act goes on to subsequently provide a different requirement for profit trading persons, thus

For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.<sup>835</sup>

From the above provision, it is clear that profit trading persons would have to prove special damages. It is suggested that a similar principle be also applicable to the corporations in privacy cases.

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<sup>833</sup> Section 2 Lord Cairns' Act 1858. Although this Act has been repealed, the spirit of the contents of section 2 is represented in section 50 of the Senior Courts Act 1981.

Section 2 empowered Chancery to award damages 'in all cases in which Chancery has jurisdiction to entertain an application for an injunction or specific performance'.

Section 50 Senior Courts Act empowers the senior courts to award damages as well as, or in substitution for an injunction or specific performance. It states that "Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance".

<sup>834</sup> Section 1(1) Defamation Act 2013.

<sup>835</sup> Section 1(2) Defamation Act 2013.

Accordingly, in the case of corporations trading for profit, the damages which may be available to it would be pecuniary damages. On pecuniary damages, the corporation would have to prove that it suffered financial loss; for instance, loss of its income, or loss of contracts, or loss of employees, as a result of the violation of its autonomy. It may be appropriate to award the corporation special damages where it is proved.

In the case of corporations not trading for profit, the violation of its privacy may give rise to non-pecuniary damages under Article 8 ECHR. Corporations which do not trade for profit may be awarded non-pecuniary damages in cases where it has suffered unfairness.<sup>836</sup> Compensatory damages may be available to corporations which do not trade for profit to compensate for the harm to its autonomy.

#### Retraction and/or enforced apology

The remedy of the retraction of offending information and, or, issuing an apology may be ordered where private information has been published or disseminated; the remedy of issuing an apology may also be ordered in the case where there has been an intrusion of the corporation's premises, activities, or property. It is suggested that the remedy of an enforced apology would be awarded as supplementary to the award of injunction or damages. This is because an apology, without more, may not provide enough vindication for the violation of the corporation's privacy; however, the award of damages, for instance, in addition to an enforced apology, may go a long way to mitigate the harm to the corporation's autonomy.

#### Destruction or delivery up of articles

The remedy of destruction of articles or delivery up of articles may be ordered where articles have been made by using corporation's private information. This was the case in *Prince Albert v Strange*<sup>837</sup> wherein the court ordered that the impressions of the

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<sup>836</sup> That a corporation may be awarded non-pecuniary damages has been seen in the case of *Societe Colas Est v France* [2004] 39 EHRR 17, para 41. The court stated that it recognised a company's right under Article 41 ECHR to non-pecuniary damage in the case of *Comingersoll v Portugal* [2001] 31 EHRR 31, para 33-35.

Article 41 ECHR provides

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

<sup>837</sup> *Prince Albert v Strange* [1849] 2 De Gex & Smale 652.

etchings made without the consent of the plaintiff be destroyed. The court will however not order that any ‘material of intrinsic value’ be destroyed.<sup>838</sup>

Finally, an account of profit has not been explored in any privacy matters involving the individual, even in situations in which there has been commercial exploitation of private information, as seen in *Campbell v Mirror Group Newspapers Ltd*.<sup>839</sup> Consequently, the discussion of the possibility of the remedy of an account of profits for the privacy of the corporation would not be pursued further at this time.

### ***Defences***

The defences which would be available to defendants in corporation privacy cases would be the same as the defences available to defendants in individual privacy cases. Under the new methodology of privacy protection, the defences which may be pleaded are found within the Convention rights involved; in this case, Article 8 ECHR and Article 10 ECHR.

#### **Article 8(2) ECHR**

In the case of a corporation’s complaint of an interference with its privacy against a public authority, the public authority would have the host of defences under Article 8(2) ECHR. Therefore, a public authority may justify its interference on the grounds that such interference is in accordance with the law and necessary in a democratic society, in the interests of (a) national security, public safety, or (b) the economic well-being of the country, or (c) the prevention of disorder or crime, or (d) the protection of health or morals, or (e) the protection of the rights and freedoms of others.

#### **Article 10(1)&(2) ECHR**

In the past, the most significant defence in the case of the press was one of an overriding public interest in disclosure. This defence was pleaded on the basis of freedom of expression of the press. The basis of the public interest defence is rooted on

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<sup>838</sup> *Prince Albert v Strange* [1849] 2 De Gex & Smale 652, 716.

<sup>839</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457.

the over 150 year old idea by Sir William Page-Wood V-C in *Gartside v Outram*<sup>840</sup> that “there is no confidence as to the disclosure of iniquity.”<sup>841</sup> Consequently, the law of privacy could not be used as a means of suppressing information concerning unlawful conduct.

However, the emergence of the extended action for breach of confidence which incorporated, *inter alia*, the right to freedom of expression under Article 10 ECHR into domestic law, has brought about a new methodology. This involves the pleading Article 10(1) ECHR, that it has the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas. However, in exercising this freedom, it must take account of Article 10(2) ECHR, to the end that Article 10(1) ECHR carries with it duties and responsibilities. As such, the exercise of Article 10(1) ECHR may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of (a) national security, territorial integrity or public safety, or (b) the prevention of disorder or crime, or (c) the protection of health or morals, or (d) the protection of the reputation or rights of others, or (e) preventing the disclosure of information received in confidence, or (f) maintaining the authority and impartiality of the judiciary.

It is nevertheless noted that where the press or other persons plead the defence of freedom of expression and in raising this defence state that the said expression is in the public interest, the information to be disclosed must actually be in the public interest, and not what is interesting to the public. As Westkamp<sup>842</sup> put it, “no legitimate public interest exists in cases ... without proper reasons beyond satisfying public curiosity”.<sup>843</sup> Furthermore, it may be in the public interest that certain information be disclosed, not to the public, but rather to an appropriate body; thus, an obligation of restrictive disclosure.

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<sup>840</sup> *Gartside v Outram* [1856] 26 LJ Ch 113.

<sup>841</sup> The quotation in full declares: “The true doctrine is, there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intentions on your part: such a confidence cannot exist.” At 114.

<sup>842</sup> Westkamp, G. Private Life and the Margin of Appreciation, Introductory Note to the European Court of Human Rights: Alex Springer AG v. Germany and Von Hannover v. Germany (No. 2) *International Legal Materials*. 2012: 51(4), 631-684, 634.

<sup>843</sup> Professor Westkamp was speaking to the publication of celebrity images.

## CONCLUSION

The aim of this thesis as set out at the beginning of this work has been to investigate whether English law ought to be further developed to provide fuller protection for the privacy of the corporation. Consistent with this aim, this thesis has endeavoured to demonstrate that corporations do have the privacy interests of intrusion privacy and information privacy, as well as the right to a private life, home, and correspondence; which are worthy of protection in English law, under the extended action for breach of confidence. Although half a decade ago, it would have almost been inconceivable to suggest that consideration be had for the protection of the privacy of the corporation, this thesis has been a mindful effort that has been strengthened at English law by the Broadcasting Act, which has since 1980 to the present, consistently provided protection for the privacy of corporations in broadcasting matters. This thesis has also been strengthened by the evolution of the jurisprudence of the European Court of Human Rights on the protection of the fundamental right of the corporation to its privacy under Article 8 ECHR. The United Kingdom being a Member State of the Council of Europe and having incorporated the ECHR into its domestic law through the implementation of the Human Rights Act 1998, it is suggested that if English law is to provide fuller protection for the privacy of the corporation beyond broadcasting matters, it would accord with section 2 and 6 HRA and Article 13 ECHR; it would also provide the corporation the autonomy which it requires to effectively carry on its activities, within the law, and without unwarranted interference.

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Article 12

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Article 17(2)

Vienna Convention on the Law of Treaties 1969

Article 31

Article 32



Article 33(4)

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Section 3(2)

Section 3(3)

Section 4(1)

Section 4(2)

Section 7(1)

Section 15(1)

Section 15(4)

Section 16

Data Protection Act 1998

Section 2

Defamation Act 2013

Section 1(1)

Section 1(2)

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